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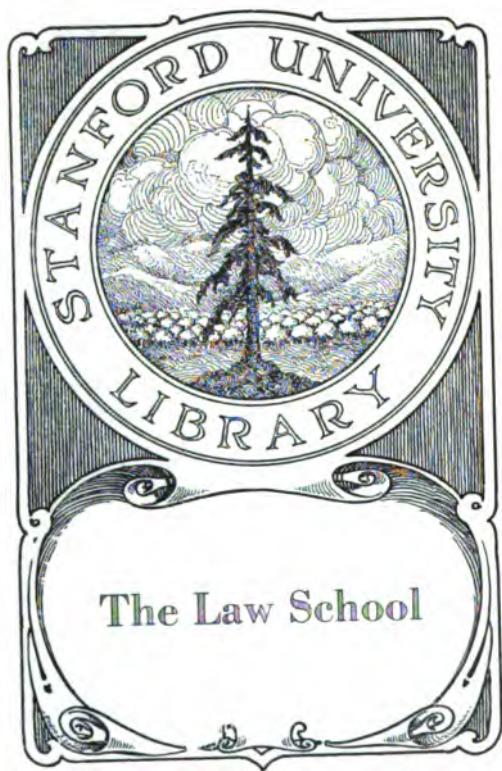
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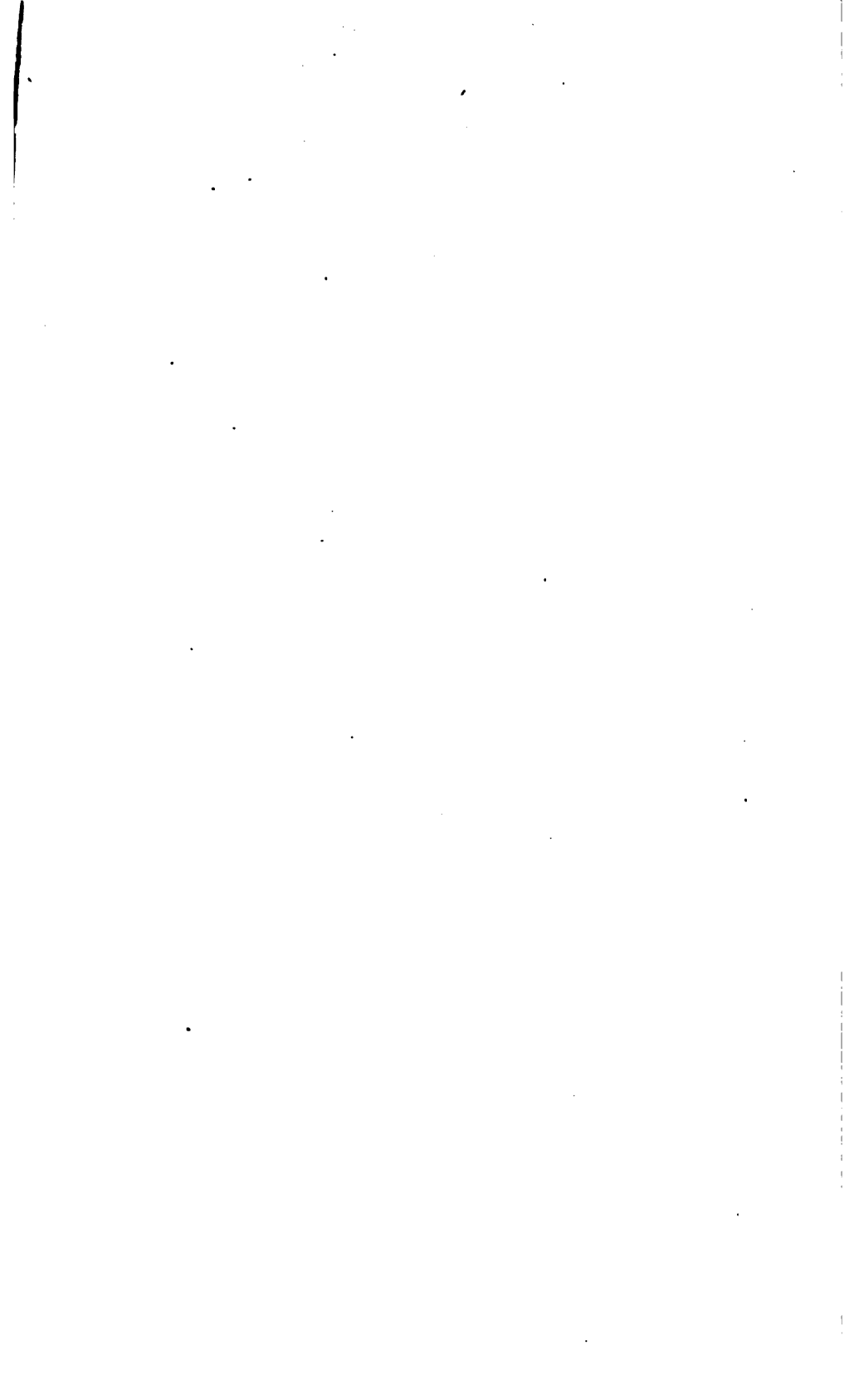
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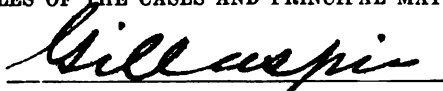
ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT,

Now Reprinted in Full.

VOL. XXXVII.

CONTAINING


CASES IN THE COURT OF QUEEN'S BENCH OF EASTER AND TRINITY TERMS
AND TRINITY VACATION, 1839, IN THE SECOND AND THIRD YEARS OF
VICTORIA; AND CASES IN THE COMMON PLEAS, FROM TRINITY
VACATION, 2 VICTORIA, 1839, TO MICHAELMAS TERM,
4 VICTORIA, 1840, BOTH INCLUSIVE.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1865.

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COURT OF QUEEN'S BENCH,

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BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

ESQRS., BARRISTERS AT LAW.

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OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

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Sir JOSEPH LITTLEDALE, Knt.

Sir JOHN PATTESON, Knt.

Sir JOHN WILLIAMS, Knt.

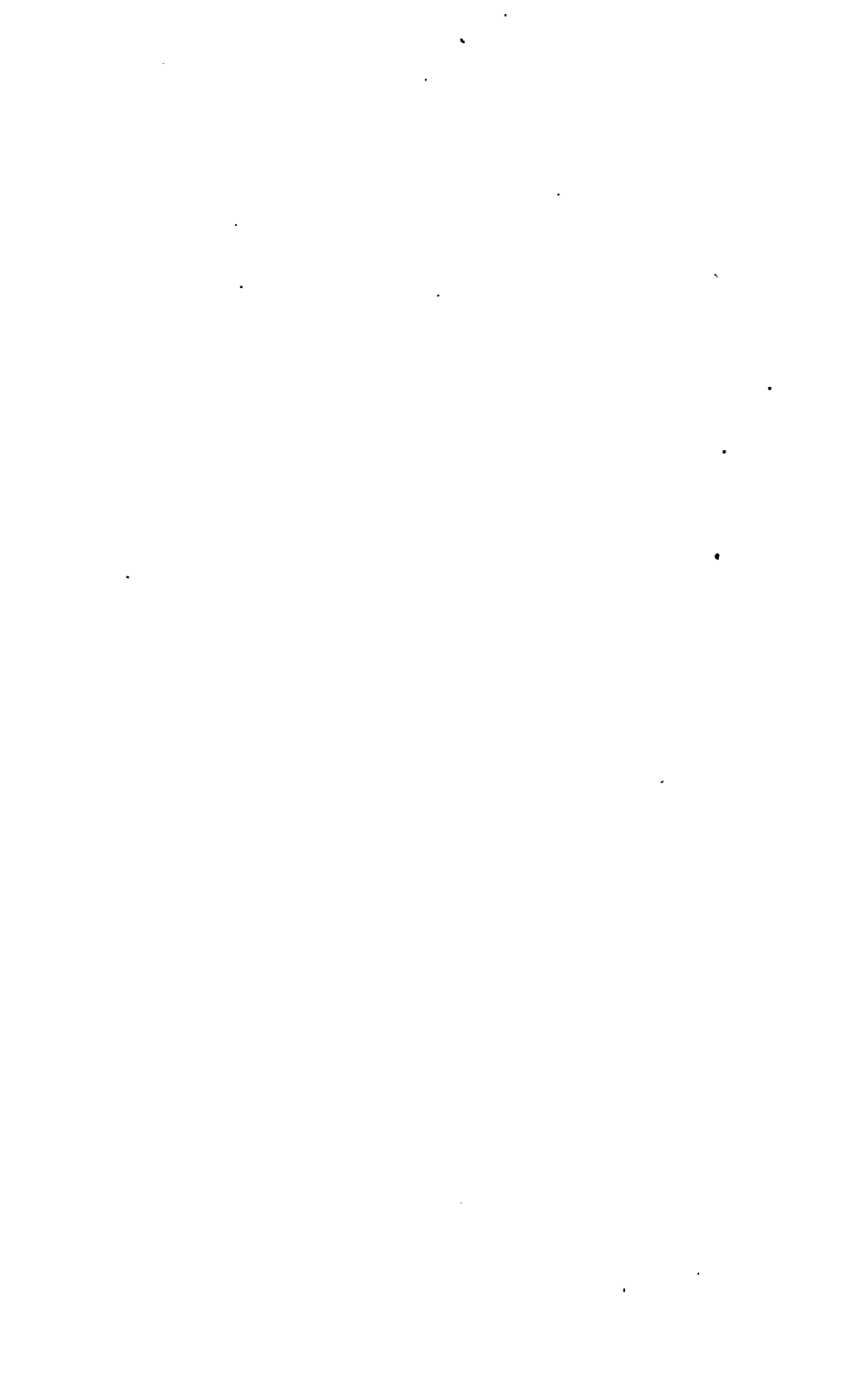
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.



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MEMORANDA.

MR. BARON BOLLAND having resigned his seat in the Court of Exchequer, WILLIAM HENRY MAULE, of Lincoln's Inn, Esquire, one of her Majesty's counsel, was, in last Hilary vacation, appointed a Baron of that Court, having first been called to the degree of the coif, when he gave rings with the motto "Suum cuique." He afterwards received the honour of knighthood.

In the same vacation *William Goodenough Hayter*, of Lincoln's Inn, Esquire, received a patent of precedence; and *John Stuart*, of Lincoln's Inn, Esquire, *Samuel Girdlestone*, of the Middle Temple, Esquire, *Robert Vaughan Richards*, of the Inner Temple, Esquire, and *Griffith Richards*, of the Inner Temple, Esquire, were appointed her Majesty's counsel.

Edmund Henry Lushington, Esquire, her Majesty's coroner and attorney in this Court, died in the same vacation, and, on the 18th of April, *Peregrine Dealtry*, Esquire, secondary on the Crown side of this Court, having been appointed to succeed him, produced in Court her Majesty's letters patent granting him the said office, and was thereupon sworn in, and took his seat.

The cases of this term (with the exception of *Stead v. Dawber*) are reported by Mr. Adolphus and Mr. Smirke, jointly.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT

TO THE

EXCHEQUER CHAMBER,

IN

Easter Term,

Gillies IN THE

Second Year of the Reign of Victoria.

The Judges who usually sat in Banc in this Term were,

LORD DENMAN, C. J.

PATTESON, J.

LITTLEDALE, J.

COLERIDGE, J.

The QUEEN against The LONDON and SOUTHAMPTON Railway Company.

The London and Southampton Railway Act (4 & 5 W. 4, c. lxxxviii.) provides that all tenants from year to year shall deliver up possession to the company at the expiration of six calendar months next after notice, whether such notice be given with reference to the commencement of the tenancy or not, and whether before or after the purchase of the lands by the company; or at such time after the expiration of the notice as they shall be required; and that where any such tenant shall be required to give up possession before the expiration of his term or interest, the company shall make compensation for the value of his unexpired term or interest. On 10th January the company gave six months' notice under the act to a tenant from year to year, whose holding began at Christmas; after the expiration of the notice, the tenant, who had refused to quit without compensation, was told by the company that possession would not be required till Christmas: the company did not take a conveyance of the reversion till 25th August.

Held, that the tenant, who voluntarily continued to occupy as usual till Christmas, was in the same situation as if a regular landlord's notice had been originally given to him, and was therefore not entitled to compensation.

CHANNELL, in Michaelmas term, 20th November, 1837, obtained a rule nisi for a mandamus to the above company to issue a warrant to summon a jury for the purpose of assessing the sum to be paid to

Messrs. Francis and Sons for the purchase of their interest in premises taken by the company under their act, 4 & 5 W. 4, c. lxxxviii., (local and personal, public,) and for compensation by reason of such taking.

Sect. 47 of that statute enacts, that "all tenants at will, lessees for a year, tenants from year to year, and other persons in possession of any lands which shall be intended to be taken or used for the purposes of this act, and who shall have no greater interest in the lands than as tenants at will, or lessees for a year, or as tenants from year to year, shall respectively deliver up the possession of such lands to the said company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months next after notice to that effect shall have been given by the said company to such respective tenants or lessees or persons in possession, or left upon the said lands, whether such notice be given with reference to the time of the commencement of such tenant's holding or not, and whether such notice be given before or after the said lands shall be purchased by the said company; or at such time after the expiration of six calendar months from the giving or leaving of such notice, as they shall be respectively required," &c. On refusal, the company is authorized to issue a precept to the sheriff to deliver possession. By sect. 48 it is enacted, that where any such tenant or lessee shall be required to deliver up the possession of lands so occupied by him before the expiration of his term or interest therein, the company shall make or tender to him, before they issue their precept to the sheriff to give possession of the lands, compensation or satisfaction for the value of his unexpired term or interest therein, such compensation, &c., in case of difference, to be ascertained by a jury in the usual way.

It appeared by the affidavits in support of the rule, that Messrs. Francis, marble merchants, had been tenants, for nearly twenty years, of the premises in question, under a tenancy from year to year, commencing at Christmas; that their landlord owned a large estate in the neighbourhood, including these premises, chiefly occupied by yearly tenants, and had never been known to remove a tenant who paid his rent regularly. Messrs. F. used the premises for carrying on their business, and had laid out large sums in improving them. On 10th January, 1837, the secretary of the company signed and served the following notice upon Messrs. F. touching the said premises:—"In pursuance of the provisions contained in an act of parliament passed" 4 & 5 W. 4, "entitled An Act for making a Railway from London to Southampton, I do hereby, on behalf of the London and Southampton Railway Company, give you notice that all that piece or parcel of ground, and all those several messuages," &c., (describing the property in question,) situated, &c., distinguished by the No. 6, in the map, &c., "and now in your occupation, will be wanted and required for the purposes of the said act; and I hereby, on behalf of the said company, give you notice to deliver up the possession thereof to the said company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months next after this notice; and I further give you notice on behalf of the said company, that the said company are willing to give you compensation for any unexpired term or interest you may have in the said premises at the end of six calendar months from this notice; and that if for the space of ten days --- after service hereof you shall neglect or refuse to treat, or shall not

agree with the said company for the amount of such compensation," (notice that in that event the company would cause a jury to be summoned to assess compensation.) After the expiration of six months from the delivery of this notice, the secretary informed Messrs. Francis that the company were then the landlords of the premises, and that Messrs. F. were trespassers on account of their neglect to remove pursuant to the notice, and demanded possession, and required them to give an immediate answer whether they would remove or not. Messrs. F. stated their willingness to remove, on being paid compensation for the same, which the company declined to do.

The affidavits on the part of the company stated, that at the time of serving the above notice on the 10th of January, they and their agents believed that the tenancy of Messrs. Francis was a yearly tenancy expiring at Michaelmas, and they accordingly notified to Messrs. F. that, although they had given a formal notice to quit at the end of six months, it was not their intention to disturb Messrs. F. in their possession until Michaelmas. The company became the legal owners of the reversion by a conveyance on 25th August. On the 30th September possession was duly demanded on behalf of the company; but no compensation was offered, (although negotiations had been and still were pending between the agents of the parties on the amount thereof,) inasmuch as the company were advised that none could of right be claimed, if possession was not demanded until the regular expiration of the tenancy. Messrs. F. refused to quit unless compensation was paid. It afterwards came to the knowledge of the company's agents that the tenancy was one that would expire at Christmas, and not at Michaelmas; whereupon Messrs. F. were informed that possession would not be required until Christmas in the same year. It was further alleged, that from the time of the notice in January, 1837, until the following Christmas, Messrs. Francis continued in possession of the premises, and carried on business there as usual, until they began to remove, a few days before Christmas; that such removal would not have occasioned any greater loss or inconvenience to them than they would have suffered by removal under any other circumstances; and that at the period of their applying to this Court for a mandamus they had, in fact, suffered none whatever. In this term (*a*)

Sir *J. Campbell*, Attorney General, and Hill, showed cause. Messrs. Francis are not entitled to compensation, unless the mere expectation of renewal is a sufficient title to it. The words of this act are very different from those of the Hungerford Market Act, in which the prospect of renewal has been held to be such an interest as gave the party a claim to satisfaction. *Ex parte Furlow*, 2 B. & Ad. 341, (22 E. C. L. R. 91); and *Rex v. The Hungerford Market Company, ex parte Still*, 4 B. & Ad. 592, (24 E. C. L. R. 122.) If the company had taken possession of the premises, or the tenants had offered to deliver them up in July at the expiration of the notice, the latter would have been entitled to compensation. But in fact, they were in possession, and had suffered no injury in their business down to the day of applying for the rule. They remained in possession until the following Christmas, at which time it is admitted that an ordinary landlord's notice would have been sufficient to determine their interest. [LITLEDALE, J. Though allowed to remain, they might have been turned out at any time

(*a*) Tuesday, April 16. Before Lord Denman, C. J., Littledale, Pateson, and Coleridge, J.

This liability may have restricted them in their business.] There is no suggestion of any such injury in the affidavits. It does not appear that they have even yet given up or offered possession. They cannot both enjoy and claim compensation for non-enjoyment. The application is to the discretion of the Court, who ought to be satisfied that some injury was sustained, which might have been estimated by a jury at the date of this motion, viz., 20th November, 1837. The words of the Liverpool and Manchester Railway Act (7 G. 4, c. xlix., local and personal, public) are almost exactly like the corresponding ones of the present act, and the mere hope of renewal has been held to be no ground for compensation under that act; *Rex v. The Liverpool and Manchester Railway Company*, 4 A. & E. 650, (31 E. C. L. R. 164.)

J. Jervis and Channell, contra. The company had it in their power either to proceed as they have done, availing themselves of a notice given under the authority of the act, in which case compensation is due; or to give a regular notice, as landlords, to quit at Christmas, which has not been done. As landlords, they could not have compelled their tenants to quit till Christmas, 1838; the latter are therefore entitled to be indemnified for the loss of so much of their unexpired term or interest. At all events they have a right to compensation for the period between 10th July and Christmas, 1837. They refused to give up possession after the notice expired, because compensation was not tendered agreeably to sect. 48; and though it is true that the company attempted to countermand their notice, and assumed the character of landlords after they had purchased the reversion, it has been decided in *Rex v. The Hungerford Market Company, ex parte Davies*, 4 B. & Ad. 327, (24 E. C. L. R. 68,) and in a previous case there mentioned, that such notice cannot be retracted so as to deprive the tenant of his indemnity, otherwise the tenant might be left in uncertainty, and at the mercy of the company, during the whole number of years allowed to them for the exercise of their compulsory right.

Cur. adv. vult.

LORD DENMAN, C. J., in the same term (Wednesday, May 1) delivered judgment as follows:

This was a rule for a mandamus, on the part of Messrs. Francis, to obtain compensation under the 47th and 48th sections of stat. 4 & 5 W. 4, c. lxxxviii., establishing the Southampton Railway Company. The language of those sections is substantially the same as that of the act establishing the Liverpool and Manchester Railway Company, and the case of *Rex v. The Liverpool and Manchester Railway Company*, is a strong authority upon the subject. In that case the claimants held under a lease for seven years, having a reasonable expectation of renewal, but no covenant or agreement to that effect: the company gave a six months' notice under the act, which expired at the same time as the term of seven years, and it was held, that the claimants had no right to any compensation.

Here the claimants were tenants from year to year commencing at Christmas. The company, in January, 1837, gave a six months' notice under the act, supposing, erroneously, that the claimants held from Michaelmas. On discovering the error, they gave notice that the premises would not be wanted till Christmas. The claimants did not

quit in July, nor indeed at Christmas. At the time of the notice in January, the company had not purchased the landlord's interest, but they did so before July, (a) and before they gave notice that the premises were not wanted till Christmas. Now, if the claimants had quitted in July, they would undoubtedly have been entitled to some compensation. but as they have chosen to hold over beyond Christmas, at which time they might have been compelled to quit by the ordinary landlord's notice without compensation, it is said that they are not entitled to any thing. On the other hand, it is contended that the tenancy has never been determined, because no regular landlord's notice was given; that the situation of the tenants was materially altered by the six months' notice given in January, and their possession rendered wholly uncertain from day to day after the expiration of those six months.

We cannot think that the act of parliament requires two notices in the case of a tenancy from year to year; but the true construction is, that the company might either give the ordinary landlord's notice, ending with the current year of the tenancy, in which case no compensation would be due, or six months' notice under the act, to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. But in order to entitle the tenant to such compensation, the premises must be given up. If, as in this case, the company inform the tenant that he may hold them till the end of the current year, and he chooses so to do, the situation of the parties is the same as if a regular landlord's notice had been originally given, and the tenant is entitled to no compensation, because he has voluntarily retained the possession.

It makes no difference that the company were not landlords when they gave the notice in January; that notice was undoubtedly meant to operate under the act, and would have done so but for the subsequent conduct of the parties. Under these circumstances, we are of opinion that this rule must be discharged.

Rule discharged.

(a) It was stated in argument that the purchase was made between 10th January and 10th July: the conveyance was on 25th August. The fact, that the claimants had not quitted at Christmas, did not appear by the affidavits, but was asserted in the course of argument.

NEWMAN against BENDYSHE and METCALFE, Clerk.—p. 11.

Where a conviction under sect. 14 of stat. 11 G. 4, & 1 W. 4, c. 64, (for the general sale of beer, &c.,) purported to charge the party with the offence of keeping his house open for the sale of beer, and selling beer, and suffering the same to be drunk and consumed in the house at an unlawful time, and convicted him in the penalty of 40s. as upon a single offence:

Held, that the conviction was bad, because it included more than one distinct offence: and that trespass lay for levying the penalty by distress.

TRESPASS for taking plaintiff's cart and detaining it till payment of money. Plea, (by statute,) not guilty.

The cause was tried at the last Lent assizes at Cambridge, before TINDAL, C. J., and the plaintiff had a verdict. Leave was reserved to the defendants to move to enter a non-suit, if this Court should be of opinion that the conviction, under which the defendants justified, was valid. Plaintiff had been convicted under sect. 14 of stat. 11 G. 4, & 1 W. 4

c. 64, (for the general sale of beer, &c.,) amended by 4 & 5 W. 4, c. 85; and the cart was seized as a distress for the penalty and costs. The conviction was as follows:—

Cambridgeshire, to wit. Be it remembered that, on, &c., Robert Newman, of, &c., was duly convicted before us, J. B., Esq., and the Rev. W. M., clerk, two of her majesty's justices of the peace in petty sessions for the division of Arrington in the said county, for that he, the said R. Newman, being a person licensed under the provisions of an act of parliament made and passed 1 W. 4; entitled "An act to permit the general sale of beer and cider by retail in England," and also under the provisions of another act of parliament made and passed 5 W. 4, entitled "An act," &c., (to amend the preceding act,) to sell beer by retail in the house occupied by him in the parish of Haslingfield, and within the division, &c., "did, on Wednesday, the 6th day of June last, &c., between the hours of nine and ten of the clock in the evening, keep open the said house in the said parish of Haslingfield for the sale of beer, and did, on the day and at the time last aforesaid, sell beer, and suffer the same to be drunk and consumed in such house, such time having been declared to be unlawful by an order of her majesty's justices of the peace for the said county, made at special sessions holden for the division of A. aforesaid, on," &c., in pursuance of the said hereinbefore mentioned act, (5 W. 4,) by which said order the said justices did among other things fix, that the hour at which houses and premises licensed to sell beer under the said last-mentioned act of parliament within the said division of A. should be closed, should for the year then ensuing be the hour of nine of the clock in the evening, excepting in July, August, and September, and on Sundays, "and which said order was not appealed against, and has not been altered, and is still in force, and notice thereof had been duly served on the said R. Newman, previous to the commission of the said offence; the said keeping open the said house for the sale of beer, and selling beer and suffering the same to be drunk and consumed therein at the time above charged and specified, being contrary to and in breach and transgression of the conditions and provisions of the license granted to the said R. Newman for the sale of beer by retail; whereby the said R. Newman has forfeited the sum of 40s., this being adjudged to be his first offence against the provisions of the said acts of parliament hereinbefore mentioned, besides the costs of this conviction," which costs were assessed under the statute at 1*l.* 18*s.* 4*d.* Then followed a distribution of the penalty, and direction for payment of costs to the prosecutor. (a)

(a) The following are the clauses of the acts under which the conviction took place:—

11 G. 4, and 1 W. 4, c. 64, s. 14, enacts, "That no person licensed to sell beer by retail under this act shall have or keep his house open for the sale of beer, nor shall sell or retail beer, nor shall suffer any beer to be drunk or consumed in or at such house, at any time before the hour of four of the clock in the morning nor after ten of the clock in the evening of any day in the week, nor at any time between the hours of ten of the clock in the forenoon, and one of the clock in the afternoon, nor at any time between the hours of three and five of the clock in the afternoon, on any Sunday," &c., (naming certain other days,) "and if any such person shall keep his house open for selling beer, or shall sell or retail beer at any time after the hour of ten of the clock in the evening or before the hour of four of the clock in the morning of any day, or between the hours of," &c., on any Sunday," &c., "such person shall forfeit the sum of 40*s.* for every offence, and every separate sale shall be deemed a separate offence."

Stat. 4 & 5 W. 4, c. 85, s. 6, enacts, "That it shall be lawful for the justices of the peace of every county, riding, division, franchise, liberty, city, town, and place, in petty sessions assembled, and they are hereby required, to fix once a year, within thirty days after the passing of this act

Kelly now moved for a rule nisi to enter a nonsuit. On the trial seven objections were made to the conviction. 1. It does not state to whom the beer was sold. This is unnecessary. The parties might not choose to mention their names. Selling per se is an offence; it matters not to whom. In *Newman v. The Earl of Hardwicke*, 8 A. & E. 124, (35 E. C. L. R. 349,) where the offence was permitting beer to be consumed on the premises, it was not objected to the conviction that the parties consuming were not named. 2. The justices who made the order under sect. 6 of 4 & 5 W. 4, c. 85, are not named. This might be an objection to the order itself; but here the order is not disputed, and is stated, in the conviction, not to have been appealed against. 3. The conviction states that the house was open, &c., at a time "declared to be unlawful by an order," &c., and it is objected that the act gives no power to declare the illegality. The answer is that, at all events, it sufficiently appears that the order fixed the times of opening and closing, and a violation of the order is illegal. The declaration of illegality is at most mere surplusage. (a) 4. The order is not said to have been made at the petty sessions. The conviction calls it a *special* sessions; in fact any session is a petty session, if it be not a general session; *Regina v. Rawlins*, 8 C. & P. 439, (34 E. C. L. R. 470.) 5. The time of keeping open house is not specified with precision, but is stated to have been "between the hours of nine and ten" in the evening. It is, however, enough to show that the time was after nine o'clock. 6. It is objected that the whole order of justices should have been set out; but this cannot be necessary, if the conviction shows so much of it as the plaintiff transgressed. 7. The last objection is that the conviction includes three distinct offences, viz. keeping the house open for the sale of beer; selling beer; and suffering beer to be drunk and consumed in the house; and that these several offences should not be included in one conviction. But the offence charged is substantially one act. The several acts are the consequences of the first. The consumer buys at the house kept open for sale. *Rex v. Salomons*, 1 T. R. 249, which may be relied on by the plaintiff, is rather an authority for the defendants. There the conviction charged the "offence" of dealing in lottery tickets and registering them without license, which were held to constitute two offences; whereas if the reasoning of the plaintiff is good, there were four offences charged; viz. keeping an office for dealing in tickets; dealing in them; keeping

in this year, and in every future year, in the counties of Middlesex and Surrey, within the first ten days of the month of March, and in every county on some day between the 20th day of August and the 14th day of September inclusive, the hours at which houses and premises licensed to sell beer under this act shall be opened and closed.

Sect. 11 enacts, "That all the powers, regulations, proceedings, forms, penalties, forfeitures, and provisions contained in the said recited act with reference to persons licensed under the said act, and to the offences committed by such persons against the said act, or against the tenor of any license granted under the said act, and also with reference to the sureties of such persons, and to persons doing the things thereby prohibited without the license required by the said act, shall (except where they are altered by this act or are repugnant thereto) be deemed and taken to be applicable to all persons licensed under this act, and to all offences committed by such persons of the same description as the offences mentioned in the said act," &c., as fully as if all the said powers, penalties, &c., had been repeated and re-enacted in this act with reference to persons licensed under this act, &c.

(a) The form of license in the schedule of 4 & 5 W. 4, c. 85, uses the words, "at any time which by any order of the justices made in pursuance," &c., (of that act,) "shall be declared to be unlawful."

an office for registering; and registering them. The Court must have treated the offences immediately connected with each other as one; viz., the keeping an office for doing a thing, and the doing of it. [Lord DENMAN, C. J. May not a person keep his house open without selling?] It is laid as one act and one offence, and a single penalty only imposed. The statement is not vitiated by introducing acts connected with and involved in it. A publican who suffers his beer to be drunk in his house must of necessity keep it open, and must have supplied the beer which his customer drinks in the house. If he had been alleged to have merely suffered the beer to be drunk, it might have been objected that it was drunk by his own family; but here the additional statement clears the charge of ambiguity, and shows the act to be illegal. [LITLEDALE, J. Sect. 14 of stat. 11 G. 4, & 1 W. 4, c. 64, imposes no penalty on the offence of suffering beer to be consumed.] (a) That rather helps the conviction, by removing one of the grounds of uncertainty. At all events, the conviction is now aided by sects. 25 and 27, which give the general form pursued in this case, and provide that want of form shall be no objection.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of this term, (Saturday, 20th April,) stated the judgment of the Court that the conviction was bad, on the ground relied upon in the seventh objection; viz., that it charged the plaintiff with more than one offence against the statute, for which he might have been distinctly convicted.

Rule refused.

(a) But see sects. 13 & 15 of stat. 11 G. 4, & 1 W. 4, c. 64; sects. 11 & 4 of stat. 4 & 5 W. 4, c. 85, and the form of license in the schedule to that act.

HORNER against KEPPEL.—p. 17.

In an action by endorsee against acceptor, defendant pleaded that he had no notice of the endorsement; that he did not promise to pay; and that plaintiff had not paid the whole consideration. The Court refused to set aside the plea as a nullity upon motion.

Where a plea is clearly frivolous, the Court will set it aside, although the defendant is not under terms to plead issuably. (a)

DECLARATION on a bill of exchange by third endorsee against acceptor, averring notice to defendant of the premises in the declaration, agreeably to the form in the schedule Reg. Gen. Trin. 1 W. 4, 2 B. & Ad. 785. Plea; that defendant had no notice of the endorsement of the bill before it became due, nor did he, at the time of the endorsement, promise to pay the amount according to the tenor and effect thereof, nor did plaintiff pay to his endorser the whole amount thereof as the consideration. Verification. Special demurrer. The defendant was not under terms to plead issuably.

Theobald moved for a rule to show cause why the plea should not be set aside, and the plaintiff sign judgment as for want of a plea. The want of notice and of consideration are wholly immaterial, and the

(a) See the next two cases.

denial of a promise is no longer permitted by the new rules of pleading. The plea, too, attempts to put several facts in issue. It is, therefore, clearly insufficient, and ought to be treated as a nullity. The practice has not been uniform, in cases where the defendant is not under terms to plead issuably. In *Cowper v. Jones*, 4 Dowl. P. C. 591, PATTESON, J., is stated to have denied the authority of the Court to interfere in such cases, except under special circumstances. In *Miley v. Walls*, 1 Dowl. P. C. 648.; S. C. 2 Law Journ. 170, (Exch.) N. S., the Court of Exchequer seem, at first, to have doubted whether a plea of no consideration by an acceptor, could be treated as a nullity; but they afterwards set aside the plea on the ground of its being false in fact. Sham pleas have often been set aside, and judgment signed accordingly; *Richley v. Proone*, 1 B. & C. 286, (8 E. C. L. R. 78;); *Smith v. Hardy*, 8 Bing. 435, (21 E. C. L. R. 340;); although *Merington v. Becket*, 2 B. & C. 81, (9 E. C. L. R. 32,) is contrary. So repugnant pleas have been considered to be nullities, where the defendant was under terms; *Serle v. Bradshaw*, 2 C. & M. 148. Bad pleading in delay of justice has always been treated as a contempt, and the fines for it once formed a source of revenue to the crown; Com. Dig., *Prerogative*, (D 52.) It is very desirable that the Court should interfere in a summary manner to prevent pleading for delay.

LORD DENMAN, C. J. I would not willingly renounce any of the jurisdiction of this Court; but, on the other hand, we must not enlarge it, or multiply cases for its interference. Where a plea is clearly frivolous on the face of it, that is a good ground for setting it aside; but the plea here is not quite bad enough to warrant that remedy.

LITLEDALE, J. Where the plea is contrary to a rule of Court, or wholly inapplicable to the cause of action, the Court will set it aside; but here the plea traverses allegations in the declaration, which are found in the forms prescribed by a rule of the Court.

PATTESON, J. If I, in *Cowper v. Jones*, repudiated any authority to treat a bad plea as a nullity, I was wrong.

COLERIDGE, J. There may be a distinction between a plea bad in law, and a plea false in fact. Some of the cases cited refer to the latter fault. The present plea is objected to on the first ground, on which we should certainly be slow to interfere; though where such pleas are put in for delay alone, it is to be regretted that the members of a liberal profession should lend themselves to so unjust an object.

Rule refused. (a)

(a) On the last day of this term, *Theobald* moved for a rule nisi that judgment be given for the plaintiff on the demurrer, and founded his application on *Haworth v. White*, 1 Arnold's Rep. 278, where, in a similar case, the Court of Common Pleas allowed the argument to be accelerated in order to defeat the attempt at delay, on the part of the defendant. The Court refused the rule, but intimated their intention of including the case among others, which they meant to set down for argument at an early day. In Michaelmas term, 1839, the Courts of Common Pleas and Exchequer set aside frivolous pleas to actions on bills of exchange, where the defendant was not under terms; *Balmano v. Thompson*, 6 New Ca. 153; *Bradbury v. Emans* 5 M. and W. 595.

KNOWLES against BURWARD.—p. 19.

Action on two bills of exchange by indorsee against acceptor. Plea, as to one bill, no consideration between drawer and defendant: as to the other, no consideration paid by plaintiff to defendant. The Court set aside the pleas, with costs, and allowed plaintiff to sign judgment, although defendant was not under terms. (a)

ASSUMPSIT on two bills of exchange, by second endorsee against acceptor. Account stated. Plea, to the count on one of the bills, that the drawer did not, at the time of making or of accepting the said bill, pay to defendant the sum mentioned in the said bill, as and for the consideration of defendant's acceptance thereof. Verification. Plea to the count on the second bill; that plaintiff did not at the time of making or accepting, &c., pay to defendant the sum mentioned in it as and for the consideration of defendant's acceptance. Verification. Plea to last count, non assumpsit.

Humfrey, in this term, obtained a rule to show cause why the pleas pleaded in the cause should not be set aside with costs, and the plaintiff be at liberty to sign judgment. An affidavit was put in by the plaintiff's attorney, stating that there was a valuable consideration for the endorsement to the plaintiff, and that he verily believed the defendant had no defence, and had pleaded for delay. On the last day of this term, (Wednesday, 8th May,)

Edwards showed cause upon an affidavit stating that defendant was not under terms to plead issuably; that the facts stated in the two pleas as to the bills were true; and that *LITTLEDALE, J.*, had already refused to make the same order. He cited *Horner v. Keppel*, ante, p. 20, and contended that there were three classes of cases only, in which judgment may be signed as for want of a plea; 1st, where the plea is a sham plea, and proved to be such by affidavit; 2dly, where the plea is absurd and impossible on the face of it; 3dly, where the plea has tendered issues to different jurisdictions; and he referred to *Cowper v. Jones*, 4 Dowl. P. C. 591, and the cases mentioned in the note to *Idle v. Crutch*, 1 Chit. Rep. 524, (18 E. C. L. R. 155.) The pleas here are not absurd, for if a bill be an accommodation bill, the action may be defeated by showing that the endorsee gave no value for it.

Humfrey, contra. The doubts attributed to *PATTESON, J.*, in *Cowper v. Jones*, were disowned in *Horner v. Keppel*.

LORD DENMAN, C. J. In *Horner v. Keppel*, the defendant traversed an averment inserted in the declaration on the authority of a rule of this Court. The matters pleaded here are clearly no defence. The plea is mere waste paper.

LITTLEDALE, PATTESON, and COLERIDGE, Js., concurred.

Rule absolute.

(a) See the next case.

The following case was decided at a later period of the term.

BLACKBURY against EDWARDS and VENOUR.—p. 21.

Debt on bond against A. and B. Defendant A., being under terms to plead issuably, pleaded that plaintiff ought not *further* to maintain his action, because defendants were in partnership as attorneys, and, after the commencement of the suit, in consideration that defendant, at the request of plaintiff, and of defendant B., would dissolve the partnership, plaintiff agreed to forbear all further proceedings in the action; and the partnership was dissolved accordingly. Plaintiff signed judgment as for want of a plea. On motion to set aside the judgment, the Court discharged the rule with costs. (a)

DEBT on a common money bond, in the penal sum of 4000*l*. Plea, by defendant Edwards, that the plaintiff ought not further to maintain his action, because, before, and at the commencement of the suit, and at the time of making the promise and agreement hereinafter mentioned, to wit, on, &c., the defendants carried on, in copartnership together, the business of attorneys at Leamington, &c., for a certain time then unexpired; and thereupon, after the commencement of this suit, to wit, on, &c., in consideration that defendant Edwards, at the request of plaintiff, and Venour, (the other defendant,) would dissolve the said copartnership, the plaintiff undertook, agreed, and promised to forbear all further proceedings in the said action: that defendant Edwards, confiding in such undertaking, &c., did afterwards dissolve the said copartnership, and the same was accordingly then put an end to, by and between the defendants. Verification.

The defendants being under terms to plead issuably, the plaintiff signed judgment as for want of a plea.

R. V. Richards now moved to set aside the judgment so signed.

Whately showed cause in the first instance, and contended that the plea was frivolous, a parol agreement being no answer to an action on a specialty; *Littler v. Holland*, 3 T. R. 590, (33 E. C. L. R. 306;) *Brown v. Goodman*, 3 T. R. 592, note (b). He also cited *Staples v. Holdsworth*, 4 New Ca. 144, and note (1) to *Fowell v. Forrest*, 2 Wms. Saund. 47 s. No material issue could be taken on this plea.

R. V. Richards, in reply. The plea does not attempt to deny the forfeiture of the bond; it is merely in bar of the *further* maintenance of the action.

PER CURIAM: (b) The plea is clearly frivolous. To be an issuable plea, it must admit of an issue being taken on some material fact. Here no issue could be taken.

Rule discharged with costs.

(a) See the two preceding cases.

(b) Lord Denman, C. J., Littledale, Patteson, and Coleridge, J.

BARSHAM against BULLOCK.—p. 23.

To a penal action on 32 G. 2, c. 28, ss. 1, 12, against the sheriff for carrying a party arrested by him to a tavern, without his free and voluntary consent, defendant pleaded that he did not

carry the plaintiff to a tavern without his free and voluntary consent, *modo et formâ*. Held, on issue joined thereon, that as the plea admitted an arrest by the defendant, and as the evidence showed the arrest to have been made by the same officer who carried the plaintiff to the tavern, there was no necessity for further connecting defendant with the act of the officer by proof of the warrant.

Quære, whether the plea operated as a denial both of the carrying to the tavern, and of the consent; or only of the consent?

While the officer was illegally carrying the party to jail within twenty-four hours after arrest, the prisoner, to avoid being taken to jail, consented to go to a tavern, and there drew up an agreement for the purpose of getting discharged: Held, that a consent so obtained was not free and voluntary within the statute, and that the plea was properly negatived by the jury.

DEBT for penalties against the sheriff of Essex, for causing plaintiff, whom he had arrested by virtue of a writ of *capias*, to be conveyed and carried to a public drinking-house, without the free and voluntary consent of the plaintiff. Plea, (among others,) that defendant did not cause plaintiff to be conveyed or carried to a public drinking-house without his free and voluntary consent, *modo et formâ*; and issue thereupon. (a)

On the trial before Lord DENMAN, C. J., at the London sittings, after Hilary term, 1839, it appeared that the sheriff's officer, who had arrested the plaintiff, was illegally conveying him to jail within twenty-four hours after the arrest, when the plaintiff, in order to avoid being carried to jail, consented to go to a tavern, and there to execute an agreement with his creditor for the purpose of procuring his discharge. It was contended, on the part of defendant, that this was evidence of consent, and that, at all events, the warrant should be produced, in order to fix the defendant with the act of the officer. The Lord Chief Justice overruled the latter objection, and told the jury that, if the plaintiff merely preferred being taken to the tavern to going to jail, and submitted to it as the less evil of the two, the plea was not supported. The jury found for the plaintiff.

Sir *J. Campbell*, Attorney-General, now moved for a rule nisi to enter a nonsuit on the grounds relied upon at the trial. The plea puts in issue both the carrying to the tavern and the want of consent. The arrest is indeed admitted, but a mere stranger may have conveyed the plaintiff to the house. The warrant must be produced to show that this was not the case; *George v. Perring*, 4 Esp. 63. Then, as to consent, the facts are cogent evidence of it; for the plaintiff went to the tavern to draw up an agreement for his own discharge, and there was no illegality in taking the plaintiff towards the jail.

Lord DENMAN, C. J. There is no pretence for saying that this was a free and voluntary consent. It is mere duress and an abuse of office. The plaintiff, finding himself about to be forcibly carried to jail, submits to be conveyed to the tavern in preference to the jail. The jury found instantly that it was not a free and voluntary consent.

(a) The action was on sect. 1 of 32 G. 2, c. 28, which enacts "that no sheriff, under-sheriff, bailiff, serjeant at mace, or other officer or minister whatsoever, shall at any time or times hereafter convey or carry, or cause to be conveyed or carried any person or persons by him or them arrested, or being in his or their custody by virtue or colour of any action, writ, process, or attachment, to any tavern, ale-house, or other public victualling or drinking-house, or to the private house of any such officer or minister, or of any tenant or relation of his, without the free and voluntary consent of the person or persons so arrested or in custody;" "nor shall carry any such person to any jail or prison within four-and-twenty hours from the time of such arrest, unless such person or persons so arrested shall refuse to be carried to some safe and convenient dwelling-house of his, her, or their own nomination or appointment," &c.

Sect. 12, imposes the penalty, and gives an action for its recovery.

LITLEDALE, PATTESON, and COLERIDGE, Js., concurred.
As to the other point,

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of this term, delivered judgment as follows:

The question in this case, upon which we took time to consider, is, whether the defendant, the sheriff of Essex, was sufficiently connected by the evidence with the person who did the act complained of, without production of the warrant. The third count of the declaration, on which the question arises, charges the defendant with having taken the plaintiff, whom he had arrested for debt, to a drinking-house without his free consent. The plea states that the defendant did not take him to the drinking-house without his free and voluntary consent in manner and form.

Now, assuming for the sake of the argument, that this plea traverses as well the fact of taking to the drinking-house by the defendant, as that it was done without the consent of the plaintiff, still it plainly admits that the defendant arrested the plaintiff; it adopts the act of the officer in arresting him; and it was not necessary to produce the warrant in order to show that arrest to be the act of the defendant. The plea admits the officer, who arrested, to be the agent of the defendant for that purpose. Then the evidence showed who that officer was, and that the same officer took the plaintiff to the drinking-house; and it being admitted that he was the agent of the defendant for the purpose of arresting, it follows that he must be his agent in all that he does arising out of that arrest.

In *George v. Perring*, 4 Esp. 63, which was referred to, the person who did the act complained of, was not the officer who arrested, and it was shown that the warrant was neither addressed to, nor handed over to him.

We think that the defendant was sufficiently connected with the act done, and that no rule should be granted.

Rule refused. (b)

(b) See *Silk v. Humphery*, 4 A. & E. 959. (31 E. C. L. R. 237.)

SUTTON and Others against TATHAM.—p. 27.

A person employing a broker to sell shares, directed him by mistake, to sell 250 shares, meaning fifty. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder, on the next day, informed his broker of the mistake, and asked if the bargain could not be made void; the broker answered "No;" and the shareholder then said he must leave the matter in his hands to do the best he could. By the rules of the Stock Exchange, brokers, on sales of this description, do not name any principal, and, if the vender is not prepared to complete his contract, the purchaser buys the requisite number of shares and the vendor is bound to make up the loss, if any, resulting from a difference in prices. The broker paid such difference, being unable to complete his contract and the purchaser having made good the shares at a loss. Held, that for the difference so advanced, the shareholder was liable to the broker in assumpsit for money paid.

Per Lord Denman, C. J., and Littledale, J. A person who employs a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules.

ASSUMPSIT for the work and labour, &c., of plaintiffs done and bestowed by them as the brokers and agents of and for defendant on his retainer

and at his request, and for commission and reward due from defendant to plaintiffs in respect thereof. Counts for money paid, and on an account stated. Plea, non assumpsit. On the trial before Lord DENMAN, C. J., at the sittings in London after last Hilary term, the following facts appeared:—The defendant had employed the plaintiffs as brokers, and had dealings with them in stock and shares for three or four years. On May 28th, 1838, he gave directions to the plaintiffs to sell for him 250 shares in the South Australian Company. They accordingly, on May 29th, sold 109 such shares to Wells, a broker, and advised defendant thereof by letter of that day; and on May 30th, they sold Wells 100 more such shares. On the same day the defendant came to the plaintiffs' counting-house, and said that there had been a mistake, and that he had intended only to sell fifty shares. He, in fact, had not the number sold by the plaintiffs. On the following day, one of the plaintiffs, Mr. Robert Sutton, had an interview with the defendant, when, as was stated in evidence, the latter said "he had got into a difficulty." Sutton said, "it was an unfortunate mistake." Defendant asked if the bargain could not be made void? Sutton said "No." Defendant then said "he must leave the matter in their hands to do the best they could." Plaintiffs, on the 31st, applied to Wells to cancel the bargain, informing him of the mistake, but he declined, saying it was too late. The Stock Exchange is governed by rules of a committee, which are in print, and one of them is, that if the selling broker is not prepared to fulfil his contract, the purchaser may buy in shares to make up the deficiency, and charge the selling broker with any loss by difference of price. The reception of this rule in evidence was objected to, but the objection overruled. If the selling broker refuses to make up the difference, he is liable to be expelled the Stock Exchange. According to the usage, no principal is named by the broker on either side. The plaintiffs being unable to complete their contract, Wells bought in shares, according to the rule, on the best terms in his power, and there being a loss on the transaction, the plaintiffs repaid this, and broker's commission for the purchase, to Wells, on his demand. The present action was brought to recover this amount, and the plaintiffs' brokerage on the sale of the shares to Wells. Sir *F. Pollock*, for the defendant, cited *Child v. Morley*, 8 T. R. 610, as showing that a broker, having voluntarily made a payment in obedience to the rules of the Stock Exchange, could not hold his principal, a stranger to those rules, responsible for the amount. Lord DENMAN, C. J., thought that in this case the principal was answerable, but as to the loss on the second purchase, he left it to the jury to say whether the bargain for that purchase was made within a reasonable time after the mistake was discovered; intimating his own opinion that the plaintiffs were only entitled to recover the commission, inasmuch as they did not appear to have done the best in their power for the defendant as to the repurchase. Verdict for the plaintiffs for 52*l.* 5*s.*, the amount of the two commissions.

Sir *F. Pollock* now moved for a new trial on the ground of misdirection. The defendant must lose the commission on the sale to Wells, that sale having been the result of his own mistake. But the plaintiffs are not entitled to commission on the repurchase, if by greater diligence, they could have procured the sale to be cancelled; and at all events they might have left the defendant, who was not amenable to the rules

of the Stock Exchange, to adjust it for himself. If they have thought proper to comply with those rules, by which no principals are known, and brokers who have contracted to sell must, under certain penalties deliver the amount contracted for, the defendant, who is not cognisant of the rules, ought not to bear the consequences of such compliance. The language of the judges, particularly that of LAWRENCE, J., in *Child v. Morley*, is strongly in the defendant's favour. [Lord DENMAN, C. J. I think a person employing one who is notoriously a broker must be taken to authorize his acting in obedience to the rules of the Stock Exchange. PATTESON, J. Did the defendant desire to have the purchaser's name given to him? Lord DENMAN, C. J., stated the evidence on this point, as above.]

LITTLEDALE, J. C. A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed.

PATTESON and COLERIDGE, Js., concurred.

PER CURIAM.

Rule refused.

DRY against MARY DAVY.—p. 30.

The following guarantee was given to the firm of M. and D., the actual members of which, at the time, were M., D., and N. "G. C. is desirous of commencing business in your line, and wants the usual credit for six months: if you think well to supply him, I will be answerable for the amount of 100*l*."

Held, that on N. withdrawing from the firm (which continued under the names of M. and D., the guarantee ceased; no intention appearing on the instrument that the responsibility should continue after such change in the partnership.

ASSUMPSIT by the plaintiff as surviving partner of Charles Flower Mirfin, on a guarantee alleged to have been given to the plaintiff and Mirfin in his lifetime. The defendant pleaded non assumpsit, and other pleas not material here. On the trial before Lord DENMAN, C. J., at the sittings in Middlesex, after last term, it appeared that the guarantee declared upon was given to Mirfin and the plaintiff, then carrying on business in partnership as linen-draper, by the defendant, and was as follows.

"Messrs. Mirfin and Dry.

"Gentlemen. My son Mr. G. C. Davy of," &c., "is desirous of commencing business in your line, and wants the usual credit for four or six months. If you think well to supply him, I will be answerable for the amount of 100*l*. I am, &c.

"29th June, 1836.

Mary Davy."

At this time the firm of Mirfin and Dry consisted of those persons, and a third partner named Nicol. Credit was given to G. C. Davy, as desired. Nicol afterwards left the firm, and Mirfin and Dry continued the business. The goods, in respect of which they now sought to enforce the guarantee, were supplied by them to G. C. Davy, after Nicol left the partnership. The Lord Chief Justice was of opinion that, on

Nicol's departure from the firm, the guarantee was at an end, and he directed a nonsuit. (a)

Sir J. Campbell, Attorney-General, now moved for a new trial. This was a continuing guarantee to the firm of Mirfin and Dry. Being given to the firm, it was not extinguished by Nicol's retiring; and he could not be joined as a plaintiff, because the credit was given after he withdrew, and therefore he never had a right of action. *Pease v. Hirst*, 10 B. & C. 122, (21 E. C. L. R. 38,) shows that the guarantee was available to the firm, notwithstanding the departure of Nicol. BAYLEY, J., says there, that "A surety bond or instrument may be so framed as to comprehend future as well as present partners." [Lord DENMAN, C. J. There the instrument was a promissory note, payable to "Pease, Harrison and Co., or order."] It certainly makes a distinction, that the guarantee there was given by a negotiable instrument.

Lord DENMAN, C. J. The language of BAYLEY, J., in *Pease v. Hirst*, makes it an authority against these plaintiffs. He says: "Here, by the form of the instrument, none of the parties have placed themselves in the situation of sureties. They appear on the face of the instrument to be principals, and not to have confined their liability to the then existing partners in the banking-house, for the note is made payable to them or order." And, consequently, after a change in the firm, it was held that the original payees might sue upon the note (which had not been endorsed) for the benefit of the new partners. Here the instrument was of a totally different description, and the change of partnership made an end of the guarantee.

LITTLEDALE, J. The circumstance of a particular person being in the firm, may be the inducement for giving and continuing the guarantee: and there is nothing in the instrument in question to show that that was not the case here.

PATTESON, J., concurred.

COLERIDGE, J. Either the guarantee was at an end, or Nicol should have joined in the action.

Rule refused.

(a) It was also contended that the guarantee, in its terms, was not a continuing one, to which point *Nicholson v. Paget*, 1 Cro. & M. 48, and *Melville Hayden*, 3 B. & Ald. 593, (5 E. C. L. R. 389,) were cited.

TOMES against HAWKES.—p. 32.

Where a verdict for the plaintiff is taken by consent at *Nisi Prius*, subject to a certificate, the referee may certify that a verdict shall be entered for the defendant, although no express authority to enter a verdict be given; and the certificate may be given after the assizes are over.

THIS cause being called on at the last Northampton assizes, was referred to a barrister. A verdict was taken for the plaintiff, and the referee was to hear the evidence, and give his certificate. The counsel for both parties consented at the trial, but no order of *nisi prius* was drawn up, nor was any rule obtained. The referee proceeded to hear the evidence on the same day, but no certificate was given until after the assizes, when the referee certified that "a verdict ought to be entered for the defendant." A verdict for the defendant was accordingly entered on the *postea*.

Humfrey now moved for a rule to show cause why the certificate should not be set aside. The referee had no power to direct a verdict to be entered for the defendant. A verdict can be given only by a jury, or by a power expressly created by rule of court or order of *nisi prius*. Here there was a mere parol submission, and no authority appears to have been given to enter a verdict for the defendant. Where certificates are given, that is invariably done during the assizes: here, the assizes had been over some time.

LORD DENMAN, C. J. In admitting that the verdict may be altered by a certificate during the assizes, you admit too much for your argument; for in no case is the same jury ever called upon to sanction the finding under the certificate. It is the consent of the parties alone that can supersede the finding of the jury. By such consent, the finding in the certificate becomes the finding of the jury.

LITLEDALE and PATESON, Js., concurred.

COLERIDGE, J. This is, in fact, a motion to set aside the verdict, disguised under the form of a motion to set aside the certificate.

Rule refused: (a)

(a) See *Donlan v. Brett*, 2 A. & E. 344, (29 E. C. L. R. 115;) *Hayward v. Phillips*, 6 A. & E. 119, (33 E. C. L. R. 21;) *Price v. Popkin*, p. 139, post.

THE QUEEN against WICKHAM.—p. 34.

Indictment stated that defendant falsely pretended to W., that he, defendant, was a captain in the East India Company's service, and "that a certain promissory note which he," the defendant, "then and there produced and delivered to" W., "*purporting to be made for the payment of the sum of 21l.*" (not saying by whom it purported to be drawn, nor otherwise describing it,) was a good and valuable security for 21l.: by which *false pretences* he obtained, &c. Whereas defendant was not a captain in the Company's service, and whereas the said promissory note which he then and there produced and delivered to W., "was not a good and valuable security for the sum of 21l., or for any other sum." Verdict, Guilty.

Held, on writ of error, that the indictment did not sufficiently describe the note, or show how it was wanting in value; and that a conviction could not be supported on the representation as to the defendant's character, because the false pretences were so connected on the record, that one could not be separated from the other.

Judgment for the crown reversed.

ERROR on a judgment of the Central Criminal Court. The defendant was convicted and received judgment on an indictment, the material parts of which are as follows:

"The jurors," &c., "That Edward Wickham, late of," &c., "being an evil-disposed person, and contriving and intending to cheat and defraud one William Walker of his moneys, on," &c., "with force and arms, at," &c., "unlawfully did falsely pretend to the said William Walker, that he, the said E. W., was a captain in the service of the East India Company, and that a certain promissory note, which he, the said E. W., then and there produced and delivered to the said William Walker, purporting to be made for the payment of the sum of 21l., was a good and valuable security for the sum of 21l.; by means of which said false pretences, the said E. W. did then and there unlawfully, knowingly, and designedly, fraudulently obtain of and from the said William Walker, eight pieces of the current gold coin of this realm, called sovereigns," &c., "of the moneys of the said William Walker, with intent to cheat and defraud him thereof: whereas, the said F. W.

was not a captain in the service of the East India Company, and whereas the said promissory note which he, the said E. W., then and there produced and delivered to the said William Walker, was not a good and valuable security for the sum of 21*l.*, or for any other sum of money whatsoever against the form of the statute," &c., "and against the peace," &c.

The errors specially assigned were, that, in the indictment, the alleged misdemeanors are uncertainly and too generally alleged: that no false token is specified: that the defendant is not alleged to have known that the promissory note was not a valuable security for 21*l.* or any other sum; that the indictment charges as misdemeanors, acts and statements, not in themselves misdemeanors or indictable offences; and that the judgment is contrary to law, and not to be pronounced or set for, or upon such matters as in the indictment are supposed.

Price, for the defendant. The indictment is bad, because the alleged means of deception consist in the defendant's bare assertion. It is not shown that he supported that assertion by reference to any token, or to any other extrinsic source of credit. The late act, 7 & 8 G. 4, c. 27, has repealed stat. 33 H. 8, c. 1, which punished the obtaining of money or goods by false tokens or letters; but in construing the act now in force, stat. 7 & 8 G. 4, c. 29, s. 53, the statute in *pari materia* of 33 H. 8, may reasonably be looked to, as it was in cases under stat. 30 G. 2, c. 24, s. 1: *Rex v. Mason*, 2 T. R. 581; *Young v. The King*, 3 T. R. 98. The object of the present act, though its words are large, ("any false pretence,") was not to introduce a new law as to the nature of the offence, but to obviate difficulties arising in practice from the subtle distinction between larceny and fraud. Now the statute of H. 8, specifies, as the means of deception, "privy tokens, and counterfeit letters in other men's names." In both those instances, something more than the credit of the defendant himself was held out; the name or sanction of a third person was introduced. At common law, the understanding as to this offence was similar. The Latin word "*prætensum*" shows that the party deceiving was supposed to use some thing or person as the medium of deception. And this agrees with the opinion which has always prevailed, that the fraud, to constitute an indictable offence, must be such an artful device as will impose upon a man of ordinary caution. [Lord DENMAN, C. J. I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him, how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?] The law prescribes it. Lord KENYON, in *Young v. The King*, admits that such a question may arise, observing, "It seems difficult to draw the line, and to say to what cases this statute shall extend; and, therefore, we must see whether each particular case, as it arises, comes within it." Passing what is termed a "flash note," would not be a false pretence. In *Regina v. Jones*, 2 Ld. Ray. 1013, where the defendant was indicted for having obtained money by pretending to be sent for 20*l.* for the use of J. S.; HOLT, C. J., said, "It is no crime unless he came with false tokens. Shall we indict a man for making a fool of another? Let him bring his action." [Lord DENMAN, C. J. Why is it the prosecutor's folly, more than the defendant's fraud? This point is sometimes put as if a lie were something laudable. There are indeed cases where the pretence is so very foolish that it is difficult to say that an imposition is practised - but still, who is to give the measure?] In *Rex v. Lara*, 6 T.

R. 565, the defendant was indicted for obtaining lottery tickets by falsely pretending that he wished to purchase, and was ready to pay for them, that a check which he produced, signed with his name, was a good check, and that he had money at a banker's to pay it. Lord KENYON said, "The case of *The King v. Wheatly*, 2 Burr. 1125, seems to have clearly established the true boundary between those frauds that are, and those that are not indictable at common law. Mr. J. DENISON there said there must either be a false token or a conspiracy. And Mr. J. WILMOT mentioned a case where an indictment for selling a sack of corn, which the defendant falsely affirmed to contain a Winchester bushel, was quashed. Now, in this case, where is the false token, or what was used by the defendant to gain credit beyond his own assertion? He sat down and drew a check on a banker; but it would be ridiculous to call that a false token; that left his credit just where it was before. What the defendant did was immoral and highly reprehensible: but as he used no false token to accomplish his deceit, the judgment must be arrested." GROSE, J. said, "In this case, in order to make it something more than a bare naked lie, it is said that the defendant used a false token, for that he gave a check on his banker: but that was only adding another lie." [Lord DENMAN, C. J. How many lies are necessary to make a false pretence?] Something ought to be produced to second the false representation; and accordingly, LAWRENCE, J., says in *Rex v. Lara*, "It is admitted that a mere false assertion unaccompanied by a recommendation is not indictable, and I think there is nothing in this case beyond the defendant's own false assertion." There must, therefore, to support such an indictment, be either a conspiracy, or else some false token, or use made of a third person's credit, to second the false pretence. And *Rex v. Wheatly*, shows that this is the law, in the case of frauds upon individuals. [COLERIDGE, J. In *Rex v. Barnard*, 7 Car. & P. 784, (32 E. C. L. R. 736,) the defendant was indicted for obtaining goods, by pretending that he was an under-graduate of Oxford; evidence was given that he went to the prosecutor's shop, wearing a commoner's cap and gown; and BOLLAND, B., held that this alone would have been proof from which a jury might infer the pretending to be a member of the University; and that such pretence would satisfy the statute: he referred also to cases "in which offering in payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence, without any words being used." Suppose, in the present case, the defendant had not stated that he was an officer, but merely appeared in uniform.] Perhaps that might have made some difference. But, at all events, if persons trust to a simple assertion, they cannot indict, but must be left to a civil remedy. As to a check or note, in giving those a third person is brought on the scene; but where a promissory note is given, if it be the parties' own, he adds nothing to his other representations, but his own undertaking to pay. He merely obtains a loan. So in *Rex v. Codrington*, 1 Car. & P. 661, (11 E. C. L. R. 518,) where the defendant sold a reversionary interest, representing that he was entitled to it, and executed an assignment with the covenant for title, LITTLEDALE, J., held that no indictment for false pretences lay. The alleged fraud here rests in mere assertion. [Lord DENMAN, C. J. Where the defendant names a third person, the pretence still rests only in his assertion. COLERIDGE, J., mentioned *Rex v. Airey*, 2 East, 30.] That

was a fraud committed by a common carrier, and might turn on circumstances peculiar to such a case. *Rex v. Villeneuve*, 3 T. R. 104, which is cited by BULLER, J., in *Young v. The King*, 3 T. R. 98, (but not separately reported,) may be relied upon for the Crown; but there a third person, known by name to the prosecutor, was introduced; and the soundness of the decision may be doubted.

But, further, the allegations respecting the note are too loose. It has been usual, where the alleged false pretence has consisted in delivering a note which proved useless, to state the purport of the note, and then to show by evidence that a note of that purport was unavailable; and if the evidence in this respect has fallen short, the indictment has failed; *Rex v. Flint*, Russ. & Ry. 460; *Rex v. Spencer*, 3 Car. & P. 420, (14 E. C. L. R. 376.) Here no description of the note is given: the record does not show who was the maker, nor when the note was payable. Something should have been stated, at least to identify it; and the indictment ought to have shown how the note proved not to be a valuable security. It may have been a forgery, or invalid for want of a stamp. And the record ought to show that the defendant knew the instrument to be worthless. It may have been a note drawn by himself, and then, so far as it was a token, it was a true one. At any rate the false token or pretence must, on an indictment, be fully stated, and specially negatived; *Rex v. Munoz*, 2 Stra. 1127; *Rex v. Perrott*, 2 M. & S. 379: as BAYLEY, J., says in the latter case, "the whole assertion which induces the party to part with his money must be stated." [The Court called upon Sir F. Pollock, for the Crown, to answer these latter objections.]

Sir F. Pollock, *contra*. The defendant's knowledge is certainly not alleged, except by the words "falsely" and "fraudulently," which are not sufficient: and the note is not set out so as to identify it. But the false pretence of being a captain in the East India Company's service is properly stated and negatived, and bears out the conviction. [Lord DENMAN, C. J. One pretence might have been unavailing without the other.] The words of the indictment are, "by means of which said false pretences the said Edward Wickham did then and there unlawfully," &c., "obtain." Now the crime, as charged, being made up of two false pretences, it must be presumed that a judge would tell the jury that one of them was so laid as not to call for an answer. [Lord DENMAN, C. J. Can we presume that on a writ of error? On a special verdict it might have been stated that the jury convicted as to one pretence, but negatived the other.] In *Rex v. Story*, Russ. & Ry. 81, it was held that an indictment for false pretences lay against a person who had tendered a money order, and by his conduct represented himself to be the person appointed in it to receive the money, though the order was genuine, and he made no verbal statement. [COLERIDGE, J. There the only false pretence alleged in the indictment was the assumption of the character, and the money was obtained by that.]

Lord DENMAN, C. J. The indictment here omits to say in what respect the note was not valuable. It may have been for want of a stamp, or from other causes. We do not mean to throw any doubt on the late decisions, and there is much of the argument for the defendant below in which we do not concur. But the pretences stated on this indictment must be taken together, and the falsification, as to that part which relates to the note, is not sufficient. The judgment must therefore be reversed.

LITLEDALE, J., concurred.

PATTESON, J. I do not know that I should have gone the whole length of reversing this judgment if the note had appeared to be that of another person; but, consistently with this indictment, the note may have been the defendant's own, and then the pretences are so connected together that we cannot separate them.

COLERIDGE, J., concurred.

Judgment reversed.

WENTWORTH and Another against COCK, Administrator of S. COCK.—p. 42.

Plaintiffs entered into an agreement with C. to supply him with a certain quantity of slate immediately; with a certain other quantity monthly, at a fixed price; and with any further quantity, monthly, that C. might require. C. engaged to receive the slate, not exceeding 200 tons per month; and the agreement was to be in force till 1st January, 1838. Held, that plaintiffs might sue the administrator of C. for refusing to receive slate sent, in pursuance of the contract, after C.'s death and before the 1st January, 1838.

ACTION of assumpsit commenced 16th June, 1837. The declaration stated an agreement in October, 1836, between plaintiffs and intestate, that plaintiffs should supply to intestate a certain quantity of slate block monthly, to be delivered in London at a specified price; that they should also supply to him, immediately, from 100 to 130 tons of blocks at the same price but of different dimensions, and any further quantity, monthly, that the intestate might require. The intestate engaged to receive any quantity of the above-mentioned blocks not exceeding 200 tons per month. The plaintiffs, during their contract with the intestate, were not to supply any other person with blocks of the same description, except for use in the plaintiffs' neighbourhood; and the contract was to be in force till 1st January, 1838, unless cancelled by mutual consent: the terms of payment to be by bill at four months, and discount for ready money. The declaration averred mutual promises, and the readiness of plaintiffs to supply the intestate during his life, and the defendant, administrator as aforesaid, since intestate's death, with blocks of the description and at the price agreed upon; and that plaintiffs, after the decease of intestate, had sent to London divers tons of such blocks in pursuance of the agreement, and were ready and offered to deliver them to defendant as in the agreement mentioned, and were ready and willing to prepare and deliver the residue; but that defendant did not nor would accept the slate blocks so sent to London and offered to him, or any part thereof, nor pay to plaintiffs the price thereof, though often requested; whereby plaintiffs lost the benefit of the agreement. Plea, that after making the agreement and promise, and before any breach thereof, by the intestate, he died. Verification.

Demurrer and joinder.

Warren, for the plaintiffs. The question is, whether this is a personal contract which expired with the intestate, or one which is obligatory on his representatives. There is a distinction in this respect between acts which do, and acts which do not, require the personal skill of the party in order to execute them. It is only in the former class of cases that the contract is held to be extinguished by the death of the contracting party. There are cases in which contracts even of a per-

sonal nature have been adjudged to be obligatory on the executor. Thus an action lies against an executor on an obligation or covenant to instruct an apprentice in his trade, "though it sounds as a personal act;" Com. Dig., *Administration*, (B 14,) referring to *Walker v. Hull*, 1 Lev. 177, where it was said by the Court, on a motion to arrest judgment, that the master's covenant obliged his executors also, "and they ought to see the apprentice taught his trade, and if they are not of the same trade, they ought to assign him to another who is of the trade, so that he may be taught according to the covenant." This is a far stronger case than the present. The same principle, viz., that an executor is liable on his testator's promise, not only to pay a debt certain, but also to do a collateral act, which is uncertain, and rests only in damages, is laid down in Com. Dig. (under the head just cited;) *Sanders v. Esterby*, Cro. Jac. 417; *Berisford v. Woodroff*, Cro. Jac. 404; S. C., as *Beresford v. Goodrouse*, 1 Roll. Rep. 433, (more fully,) and in Sheppard's Touchstone, 482. In *Hyde v. The Dean and Canons of Windsor*, Cro. Eliz. 552, it is said "a covenant lies against an executor in every case, although he be not named: unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform." In all these cases, the executor is liable though not named; *Hambly v. Trott*, Cowp. 371; *Hyde v. Skinner*, 2 P. Will. 197. A building contract survives the death of the parties; per COKE, C. J., in *Quick v. Ludborrow*, 3 Bulster. 30. The distinction between the contracts of the testator which are extinguished by his death, and those which are not, is well put in Pothier on *Obligations*, Traité, &c., de Droit Civil, tom. i. p. 343, ed. 2, 4to., part 3, ch. 7, art. 3. "Il y a aussi quelques dettes qui s'éteignent par la mort du débiteur. Telles sont celles qui ont pour objet quelque fait personnel au débiteur. . . . Hors le cas des faits personnels, celui qui a promis de faire quelque chose, et qui est mort sans l'avoir fait, quoiqu'il n'ait pas été mis en demeure de la faire, transmet son obligation à ses héritiers, qui sont obligés de faire ce que le défunt s'étoit obligé de faire." The same principle is adopted by Cod. Justinian. Lib. 8, tit. 37. De contrahendâ et committendâ stipulatione; s. 15. "Si quis spoponderit," &c. The general rule is thus laid down in 3 Bac. Ab. 535, *Executors and Administrators*, (P) (7th ed.): "It is clearly agreed, that executors and administrators, standing in the place of those whom they represent, shall be answerable for all their debts, covenants, &c., as far as they have assets, and that the testator's covenant shall extend to them, though not expressly mentioned." In *Siboni v. Kirkman*, 1 M. & W. 419, PARKE, B., says, "Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required." The principles now relied upon are recognised in *Marshall v. Broadhurst*, 1 C. & J. 403; S. C. 1 Tyr. 348, and *Corner v. Shew*, 3 M. & W. 350.

Godson, contra. This is a personal contract. The intestate was required not merely to pay money, but to exercise a discretion as to the quantity required. The decision in *Marshall v. Broadhurst*, shows that executors may enforce a building contract; but it does not follow that they are liable upon one. *Corner v. Shew*, proves that such a contract does not devolve on the executor. *Robson v. Drummond*,

2 B. & Ad. 303, (22 E. C. L. R. 81,) shows that even a contract to job a carriage is a personal one, and is confined to the original parties to it. [PATTESON, J. In that case there was an attempt to assign a contract, and to enforce it in the name of the assignee. There was, indeed, a case at Liverpool where a contract to build a lighthouse was held to be personal; but that was on the ground of its being a matter of personal skill and science.]

LORD DENMAN, C. J. There is nothing in the defence. The contract leaves no option to the intestate of refusing to take the slate delivered monthly in certain quantities and at fixed prices, or the quantity to be delivered immediately. As to the further quantity to be delivered if required, the defendant will probably not now require it. This is the only part of the contract on which the intestate could have exercised any choice. It is like any ordinary case of goods ordered by a testator, which the executor must receive and pay for.

LITLEDALE, J. No doubt the personal representatives are bound, although not named; and they are bound to pay damages out of the assets, if they do not take the contract upon themselves.

PATTESON, J., concurred.

COLERIDGE, J. If the contract had been merely to supply what the intestate might require, a different question would have arisen.

Judgment for the plaintiffs.

TURNER against ROOKES.—p. 47.

If a husband, living separate from his wife, and allowing her a maintenance, uses such violence towards her that she is obliged to exhibit articles of the peace against him, she may employ an attorney for that purpose at his expense.

And if such attorney sues the husband for his costs, the Court will not inquire whether or not the wife could have paid them out of the maintenance, without resorting to the husband.

ASSUMPSIT for work and labour, &c., as a solicitor; for money paid; and on an account stated. Plea, non assumpsit. On the trial before MAULE, B., at the last Spring assizes at Taunton, the facts appeared to be as follows:—The defendant and his wife had been separated for seven years, she living upon a maintenance of 112*l.* per annum, which the defendant had secured to her by deed. The cause of separation did not appear. At the Bath quarter sessions, April, 1838, she exhibited articles of the peace against the defendant, charging him with having used threats and personal violence towards her, of which evidence was given at the present trial. The defendant was bound in recognisances to keep the peace; and the plaintiff, who had acted in the proceeding as Mrs. Rookes's attorney, brought this action for the amount of his bill of costs. The defendant's counsel objected that, on this case, it did not appear that the wife had any implied authority from the husband to contract the debt; and he contended that the plaintiff should be nonsuited. The learned judge refused to nonsuit, and stated his opinion to be, that if the wife had such reason to apprehend violence as made it necessary for her to exhibit articles of the peace, she was authorized to employ an attorney for that purpose: and in summing up he left it

to the jury to consider, first, whether Mrs. Rookes had reasonable ground for seeking protection by articles of the peace; and, secondly whether she had sufficient pecuniary means of obtaining such protection without resorting to her husband. The jury found a verdict for the plaintiff.

Crowder, on a former day of the term, (a) moved for a new trial on the ground of misdirection. Assuming that articles of the peace were necessary for the wife's protection, it ought to have been shown that the separation between these parties had resulted from the husband's misconduct, or had taken place under such other circumstances as would legally authorize her to contract debts with which he should be chargeable. *Mainwaring v. Leslie*, M. & M. 18, (22 E. C. L. R. 236,) and *Hindley v. The Marquis of Westmeath*, 6 B. & C. 200, (13 E. C. L. R. 141,) show the rule on this subject where the wife has become indebted for goods, and this case falls within the same principle. The jury's attention was not called to the necessity of proof respecting the circumstances of the separation. And the learned judge left a question of law to them, in asking them whether the wife had reasonable ground for exhibiting articles of the peace. And further, in putting the question, whether she had means of obtaining protection without resorting to her husband, he should have pointed out to the jury that she had a maintenance allowed, and should at least have given them some rule by which to decide whether it was or not sufficient for such a purpose as this. [Lord DENMAN, C. J. I do not see that the separate maintenance has any thing to do with the question. She has that for other purposes: this cannot have been contemplated in making the allowance. The defendant was bound to protect her, I should think, though they were living apart. LITTLEDALE, J. I think so too.]

The Court took time to confer with MAULE, B.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. On referring to the notes of the evidence, there appears sufficient to show that the wife was in personal danger which warranted her exhibiting articles of the peace. Then the question is, whether the defendant was liable for the costs, it appearing that he allowed his wife a separate maintenance. There was some discussion as to the sufficiency of the allowance, but we need not go into that. The defendant was proved to have himself committed violence against his wife, and he cannot avail himself of the maintenance to exempt him from the charges incurred by his own violent conduct. There will therefore be no rule.

Rule refused. (b)

(a) April 19th. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, J.

(b) See *Grindell v. Godmond*, 5 A. & E. 755, (31 E. C. L. R. 431.)

MATTOCK, Executor of SOUTHWOOD, against KING-LAKE.—p. 50.

By articles under seal, A. agreed to sell and B. to purchase certain premises. B. therein covenanted to pay, on or before a fixed day, as the consideration of such sale and purchase, a certain sum, with interest to the time of the completion of the purchase, A. allowing thereout the same rate of interest for so much of the money as might be paid in the meanwhile; and B. agreed to pay for the conveyance and the stamp.

Held, that the conveyance was not a condition precedent to, or concurrent with, the payment and that A. might therefore sue for the purchase-money and interest, without previously tendering a conveyance.

DEBT by the plaintiff as executor of one Southwood. The declaration stated that defendant was seised in fee of certain premises by virtue of a bargain and sale enrolled, dated 19th February, 1822, by which the Bishop of Winchester had bargained and sold the same to Southwood in fee to such uses as he (Southwood) by deed or instrument in writing, with or without power of revocation and new appointment, sealed and delivered by him in the presence of, and attested by, one or more credible witness, should from time to time, or at any time, appoint of and concerning the same; and in default of such appointment to the use of defendant in fee, in trust for Southwood, his heirs and assigns for ever. That, defendant being so seized, it was afterwards agreed by and between Southwood and defendant, at defendant's request, that Southwood should convey to defendant all his estate and interest in the premises; that thereupon by articles of agreement, sealed and delivered by Southwood in the presence of a credible witness, and made between Southwood and defendant, Southwood agreed to sell and defendant to purchase the said premises for the sum thereafter mentioned; and defendant thereby, for himself and his heirs, covenanted with Southwood, his heirs and assigns, to pay to him or them, on or before 19th February, 1825, as the consideration for such sale and purchase, the sum of 11,206*l.*, with interest at 5 per cent., payable half yearly, to the time of the completion of the purchase, Southwood allowing thereout the same rate of interest for so much of the purchase-money as had been, or might be, paid to him in the meanwhile; and defendant thereby also agreed to pay for the conveyance and stamp duty. Averment, that Southwood, in his lifetime, was always ready and willing to perform his part of the agreement, and did in fact offer to execute a conveyance to defendant of all his estate and interest in the premises, whereof defendant had notice; and that defendant had been ever since the agreement in possession of all the premises, and in receipt of the profits to his own use; yet defendant did not, nor would, pay or cause to be paid to Southwood, in his lifetime, the said sum and interest for the same on or before the said 19th February, 1825, although the purchase, by and through the default of defendant, had not been completed before that day; and although Southwood was living on and after that day; nor had defendant, since the death of Southwood, paid the same to plaintiff, executor as aforesaid; but on the contrary, a large sum, to wit, &c., for principal and interest, parcel of the above sum, was still due and unpaid, the rest having been satisfied; whereby an action accrued. &c.

Plea: that Southwood did not at any time tender to defendant any

conveyance of the premises so agreed to be sold by him to defendant, or of any part thereof. Verification. General demurrer and joinder.

Bere, in support of the demurrer. There is no obligation on the part of the vendor to tender a conveyance, where the expense of it and the stamp duty are to be paid by the purchaser. It is the purchaser's duty to prepare and tender it, even where the contract of sale is silent as to the expense; 1 Sugd. Vendors, &c., ch. 4, sec. 4, § 55, et seq. p. 374, &c. 10th ed., where the authorities are collected. In *Price v. Williams*, 1 M. & W. 6, a lessee, suing the party who had contracted to let, and who was to pay for the lease, was held not bound to aver a tender. Indeed, it is not clear that the vendor can recover the costs of the conveyance, if he incurs them without the direction of the vendee. At all events, the tender of a conveyance is not a condition precedent, where a time is fixed for payment of the purchase-money, and none for making the conveyance. *Pordage v. Cole*, 1 Saund. 319, is directly in point, and is not distinguishable from the present case. The rules for ascertaining the dependence or independence of covenants in a contract are all to be found in the note (4) (1 Wms. Saund. 320) of Mr. Serjt. Williams on that case. The fact, that the defendant is admitted on the record to be already seised in fee of the legal estate, is alone enough to obviate the necessity of a tender, or, indeed, of any conveyance at all. The articles of agreement, executed in the manner set forth, operated as an execution of the power reserved to Southwood; so that the whole estate and interest, legal and equitable, was already in the defendant.

Manning, contra. Although it is alleged in the declaration that the defendant was seised in fee in trust for Southwood, yet the declaration also sets out the conveyance under which the defendant is supposed to have become seised, and that conveyance is an indenture of bargain and sale, by which the premises were conveyed to Southwood and his heirs, to uses to be thereafter appointed. A bargain and sale would at common law pass no estate to the bargainee, but in respect of the consideration they would create a *use*, and, from the moment of the execution of the indenture of bargain and sale, the bargainor would stand seised to the use of the bargainee. That use is now executed in the bargainee by the Statute of Uses; but after the statute has once operated to transfer the seisin, it can go no further, and all subsequent uses are void at law, and are merely cognisable as trusts. Here, therefore, the use appointed to the defendant by Southwood, by the articles of agreement, took effect only as a trust, not executed by the Statute of Uses.

But supposing the legal estate to have been vested in the defendant, there was an equitable interest in Southwood, which was the proper subject of a conveyance. It is true that for some purposes a bare contract is said to be an equitable conveyance; but it cannot be contended that a simple contract between a cestui que trust and his trustee, accompanied with merely such formalities as will satisfy the Statute of Frauds, will enure as a perfect conveyance. It was never supposed that a mere contract of sale between trustee and cestui que trust required the ad valorem duty of a conveyance; yet, according to the doctrine contended for on the other side, the contract, followed by the fact of payment of the purchase-money on the appointed day, would complete the defendant's legal and equitable title. It was never in contemplation that the defendant should rest satisfied with such an inferential conveyance;

thus is evident from the stipulation respecting the costs of the conveyance and the stamp duty ; which stipulation would of itself be sufficient to entitle the defendant to call for a conveyance, even if the contract itself had conferred an unexceptionable title. As to the argument drawn from the fixed day of payment, it is not denied that parties may contract for a conveyance to be executed on one day, and the purchase-money paid on a precedent day ; but the courts will not put such an interpretation upon a contract, unless the intention is plain. In *Portage v. Cole*, 1 Saund. 319, the words, "the money to be paid before Midsummer, 1668," stand unconnected with any mention of conveyance or consideration. Here several expressions indicate an intention to make the conveyance and the payment concurrent and mutually dependent acts. The 11,206*l.*, or the balance, is to be paid on the 19th February, 1825, "as the consideration of such sale." Now, though the words "shall give" "775*l.* for all his lands," occur in *Portage v. Cole*, yet the words relied upon in that case, (viz. "the money to be paid before Midsummer, 1688,") as making the engagement to pay unconditional, occur in a different part of the deed. Again, interest is to be paid with the principal "to the time of the completion of the purchase." Now the purchase (which means the acquisition of the land by the vendee), cannot be said to be complete until the land is conveyed. Unless, therefore, the two acts were intended to be concurrent, the purchase-money might be paid in February, 1823 ; and if, by death or incapacity of parties, the conveyance was delayed till 1833, the defendant might be called upon for ten years' interest on money which he had paid, and of which Southwood was, in respect of the same period, receiving interest from other sources. The circumstance of the provision for payment of the expenses of conveyance being coupled with stipulation for paying the money and completing the purchase, is a further proof that the conveyance and payment of the purchase-money were to be contemporary. A bill in equity for a specific performance lies as well for vendor as vendee ; *Gibson v. Patterson*, 1 Ak. 12 ; *Baxter v. Lewis*, Forrest, 61 ; yet such a bill would be absurd if the vendor might, at law, recover the amount of the purchase-money, although he had not conveyed, for the jurisdiction of equity proceeds on the ground that the plaintiff has no adequate remedy at law. If a vendee fail to pay the purchase-money on the stipulated day, the vendor may file a bill for a specific performance, or he may sue at law for the damage which he has sustained by reason of the breach of covenant, or of promise, on the part of the vendee ; but if he choose to sue at law in a form of action in which he seeks to recover the price of the property sold, he must actually execute a conveyance, and tender it to the vendee ; *Standley v. Hemmington*, 6 Taunt. 561 ; *Heard v. Wadham*, 1 East, 619 ; *Goodisson v. Nunn*, 4 T. R. 761 ; *Glazebrook v. Woodrow*, 8 T. R. 366 ; *Pincke v. Curteis*, 4 Bro. C. C. 332.

Lord DENMAN, C. J. None of the circumstances relied upon by Mr. Manning, are sufficient to show that the acts of payment and conveyance here were to be concurrent, or to distinguish this case from *Portage v. Cole*, 1 Saund. 319, and the authorities cited in the note to it. If, as is contended on the part of the plaintiff, the legal and equitable estates are now united in the defendant, he requires no remedy against the plaintiff, which he has not already in his own hands. If not, we cannot help him to a remedy which he has not secured for himself by his contract

LITLEDALE, J. A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase-money without averring performance of the consideration. An action for not executing a conveyance of the premises might have been maintained by the defendant before the day of payment: and in such action no allegation of payment would have been necessary. The covenants are independent, and each party has relied upon his remedy by action against the other. The case, therefore, differs from *Callo-nel v. Briggs*, 1 Salk. 112, and from *Goodisson v. Nunn*, 4 T. R. 761, *Glazebrook v. Woodrow*, 8 T. R. 366, and other cases cited, where both acts were to be done at the same time, or on the same day.

PATTESON, J. *Pordage v. Cole*, 1 Saund. 319, is directly in point. We must overrule it if we decide in favour of the defendant. There is no express provision that the conveyance shall be executed before payment, nor any reasonable intendment that it was to be necessarily precedent to, or concurrent with it. The words "completion of the purchase," which furnish the only plausible argument in the defendant's favour, only mean payment of the rest of the purchase-money. On the day specified, the defendant was to pay all the principal sum that remained due, with interest up to that time; but he might have prevented the further running of interest, by payment at any time before that day, if he pleased.

COLERIDGE, J. We must collect the intention of the parties from the whole instrument. It fixes with precision the time of payment, which is expressed to be the consideration of the sale and purchase, and contemplates the possible payment before that time. It is possible that "the completion of the purchase" may have the meaning attributed to it by Mr. *Manning*; but I see no good ground for this construction. The defendant might have paid all the money, and called for a conveyance immediately. The acts are clearly independent, within the rule correctly laid down by Mr. Serjeant Williams, in the note to *Pordage v. Cole*, 1 Wms. Saund. 320, note (4).

STEAD against DAWBER and STEPHENSON.—p. 57.

Declaration, in assumpsit, stated that plaintiff agreed to buy, and defendant to sell, a cargo to be delivered "on the 20th to the 22d instant," to be paid for by acceptance three months from delivery; and that afterwards, before the 22d, plaintiff, at request of defendant, gave time for the delivery, to the 24th; breach, that defendant, though requested (to wit, on 24th) to deliver, had not, on 24th, or any other time, delivered; special damage by rise of price between the agreement and breach. Plea, that the giving of time was part of a contract for the sale of goods at the price of above 10*l.*; and that there was no part acceptance, or earnest, or note or memorandum in writing. Replication, that the giving of time was not part of the contract, &c. It appeared that there was a written contract, as stated in the declaration, for the delivery "on the 20th to the 22d;" but, the 22d falling on Sunday, plaintiff, at defendant's request, verbally agreed to enlarge the time to the 23d or 24th. The price fluctuated between the time of the agreement and the 24th, being higher on the last day. It was understood that the enlargement of time would postpone the delivery of the three months' acceptance.

Held, that on these facts defendant, under stat. 29 Car. 2, c. 3, s. 17, was entitled to the verdict, the enlargement of time having materially varied the contract, substituting for it a new contract on a similar consideration, and not being merely a dispensation from performance on a particular day.

ASSUMPSIT. The declaration stated that the plaintiff heretofore, to wit, 10th May, 1836, at the special instance, &c., bargained for and

agreed to buy of the defendants, and defendants then bargained for and agreed to sell to plaintiff, a sloop-load of about 400 quarters of ground bones, of good merchantable quality, at 16s. 6d. a quarter, free on board, to be delivered on the 20th to the 22d then instant; payment by acceptance three months from delivery; that afterwards, and before the said 22d day of May, to wit, 17th May, plaintiff, at the special instance, &c. gave time to defendants for the delivery of the said sloop-load of ground bones until the 24th day of the said month of May; and, although plaintiff hath always, from the time of the making the said contract hitherto, been ready and willing to accept and receive from defendants the said sloop-load, &c., and to pay for the same at the rate or price, and in manner aforesaid, whereof defendants, during all the time aforesaid, had notice, and were, to wit, on 24th May, requested by and on behalf of plaintiff to deliver to him the said sloop-load of ground bones, yet defendants, not regarding their said contract, but contriving, &c., did not nor would, upon the said 24th day of May, or at any time or times whatsoever, deliver to plaintiff the said sloop-load, &c., or any part thereof, but wholly refused, &c.: whereby plaintiff hath wholly lost and been deprived of the advantage which he would have derived from the performance of the said contract, and hath lost and been deprived of profits which might, and otherwise would have accrued to him from the delivery of the said sloop-load of ground bones, the price thereof having greatly risen, (to wit,) to the extent of 17. 4s. 6d. per quarter, between the making of the said agreement, and the refusal of defendants to fulfil the same as aforesaid.

Pleas. 1. Non assumpsit. Issue thereon.

2. That plaintiff did not, at the special instance, &c., give time, &c., in manner and form, &c.: conclusion to the country. Issue thereon.

3. That defendants had no notice that plaintiff was ready and willing to accept, &c., in manner and form, &c.: conclusion to the country Issue thereon.

4. That the said giving of time for the delivery of the said sloop load of ground bones, in the declaration mentioned, formed and was part and parcel of a contract between plaintiff and defendants for the sale of certain goods, (to wit) ground bones, for the price of upwards of 10*l.* sterling, by defendants to plaintiff, and that plaintiff did not accept any part of the said goods so sold and actually receive the same, nor did plaintiff give any thing in earnest to bind the said bargain or in part of payment, and that no note or memorandum in writing of the said bargain was made and signed by defendants or either of them, or their agent or agents thereunto lawfully authorized: verification. Replication, that the said giving of time, &c., was not part of the contract between plaintiff and defendants for the sale of the said ground bones: conclusion to the country. Issue thereon.

On the trial before ALDERSON, B., at the York Spring Assizes, 1837, the plaintiff put in the following written note, signed, on the day of the date, by the broker acting for the plaintiff.

"Hull, 10th May, 1836.

"Bought of Messrs. Dawber and Stephenson, for Mr. William Stead, of Borobridge, a sloop-load of about 400 quarters of ground bones of good merchantable quality, at 16s. 6d. a quarter, free on board, to be delivered on the 20th to the 22d instant. Payment by acceptance at three months from delivery.

"Joseph Dawson, Broker."

It further appeared, that on the 17th of May, Dawson told the defendant Stephenson, that the 22d would fall on a Sunday, and asked him if he could deliver the bones on the 21st; to which Stephenson answered, "You had better say Monday or Tuesday;" and Dawson replied, "Monday or Tuesday." The bones were not sent: the price was afterwards tendered, and refused by the defendants. The price of bones had risen to 21s. per quarter on the 24th May. Dawson stated in evidence that the time for delivery of the bills would be enlarged to 24th May, by the time for delivering the goods being enlarged to that day.

The defendants' counsel contended that, the written contract having been varied by a verbal agreement, there was no complete written contract, under sect. 17 of the Statute of Frauds, upon which the plaintiff could recover: but the learned judge, being of opinion that the effect of the enlargement of the time was, not to alter the contract, but only to dispense with its performance on the day first named, directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendants on the issues upon the first and fourth pleas. In Hilary term, 1837, Alexander obtained a rule accordingly. (a) In last Hilary term, (b)

Cresswell and *Martin* showed cause. The alteration as to the time of delivery formed no part of the contract as it was originally framed, nor did it vary that contract: it was merely a dispensation from performing part of its terms, which prevented the plaintiff from availing himself of a breach of that part: there was, therefore, no necessity, under stat. 29 C. 2, c. 3, s. 17, that any writing should be given, referring to this alteration. The same point was decided in *Cuff v. Penn*, 1 M. & S. 21; and *Thresh v. Rake*, 1 Esp. 53, is to the same effect. *Goss v. Lord Nugent*, 5 B. & Ad. 58, (27 E. C. L. R. 33,) is inapplicable. There the substance of the written contract, to make a good title to fourteen lots, was varied by the new verbal agreement, which in effect substituted a contract to make a good title to thirteen only. If the contract here could not be altered by verbal agreement, then the verbal agreement forms no part of the contract, and then the issue on the fourth plea must be entered for the plaintiff; and also, on that supposition, the plea of non assumpsit fails. Therefore, either there is no variation of the contract, or the contract, as varied, is good. But, in fact, the verbal agreement is no part of the contract set out in the declaration, which is merely framed on the original bought and sold note. This shows the distinction between the present case and *Goss v. Lord Nugent*, where the declaration treated the verbal contract as incorporated in the written one; and the Court said, "The written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into." The breach here is that there was no delivery at all: if the defendant had proved a delivery on the day named in the verbal agreement, that would have been an answer to the breach in the nature of accord and satisfaction, not of a performance of the contract declared upon.

Alexander and *Cowling*, contra. The declaration shows, in the first

(a) The rule was also for the reduction of damages, on grounds which became immaterial by the decision of the Court.

(b) January 21st, 1839. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

instance, a contract binding the defendant to deliver by the 22d, and the plaintiff to give an acceptance at three months from the delivery: then it shows a substitution of a new day of delivery, and necessarily of a new time for the delivery of the acceptance, and for its maturity. That is a material variation of the contract; and it takes place on a fresh consideration. In the case of sales of real property, under sect. 4 of the statute, time, at law, is of the essence of the contract; and it is so in equity where the value of the thing sold may depend upon the time of performance, as here; 1 Sugd. Vend. and Purch. 402, 10th ed.; *Wilde v. Fort*, 4 Taunt. 334; *Doloret v. Rothschild*, 1 Sim. & St. 590; *Rothschild v. Hennings*, 9 B. & C. 470, (17 E. C. L. R. 421;) reversing the judgment of C. P. in *Hennings v. Rothschild*, 4 Bing. 315, (13 E. C. L. R. 448.) [LITTLEDALE, J., referred to *Shepherd v. Johnson*, 2 East, 211.] (a) *Cuff v. Penn*, 1 M. & S. 21, can hardly be considered an authority now; and there a partial delivery, on a day later than that named in the contract, had been made and accepted; and Lord ELLENBOROUGH lays a stress on that fact. There, too, the action was for not accepting, and the difficulty did not exist which arises here from the difference of value at different times. In *Thresh v. Rake*, 1 Esp. 53, the agreement did not require a writing under the statute of frauds; and the Court, in *Goss v. Lord Nugent*, 5 B. & Ad. 58, (27 E. C. L. R. 33,) distinguish, as to the effect of varying a written contract, between written contracts which might have been enforced if only verbal, and those under the Statute of Frauds. *Warren v. Stagg*, cited in *Little v. Holland*, 3 T. R. 591, perhaps is in favour of the plaintiff; but that case is inconsistent with later authorities. The cases under sect. 4 of the Statute of Frauds apply in principle to sect. 17; and upon sect. 4, it is now clear that a written contract, under the Statute of Frauds, cannot be varied by a verbal agreement; *Goss v. Lord Nugent*; *Harvey v. Graham*, 5 A. & E. 61, (31 E. C. L. R. 270; *Stowell v. Robinson*, 3 New Ca. 928, (32 E. C. L. R. 386.) Under sect. 17, the Courts have enforced the provisions of the act very scrupulously, with a view to guard against the mischief which the statute meant to obviate, as in *Elmore v. Kingscote*, 5 B. & C. 583, (12 E. C. L. R. 327.) BAYLEY, J., appears to apply the same rules of interpretation to the two sections, in *Kenworthy v. Schofield*, 2 B. & C. 945, (b) (9 E. C. L. R. 286.) *Greaves v. Ashlin*, 3 Camp. 426, and *Meres v. Ansell*, 3 Wils. 275, show the unwillingness of the courts to vary or explain written contracts by oral testimony.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (May 7th,) delivered the judgment of the Court.

This was an action to recover damages for the non-delivery of a cargo of bones. By the sold note, they were to be shipped on the 20th to the 22d of May, and to be paid for by an acceptance at three months from the delivery. The 22d happened to be on a Sunday; and, a conversation taking place between the defendant and the plaintiff's agent respecting this, upon the suggestion of the defendant, the Monday or Tuesday immediately following, were substituted as the days of delivery. The agent who proved this, also stated that the time for giving

(a) See *Green v. Bicknell*, 8 A. & E. 701, (35 E. C. L. R. 505.

(b) See p. 947.

the acceptance would, in consequence, be also proportionably enlarged. The main question at the trial, and before us, was, whether this enlargement of the time was an alteration of the contract, or only a dispensation with its performance as to time. The declaration, after setting out the original contract, stated that the plaintiff, at the special instance of the defendants, gave them time for the delivery to the 24th May, and averred a demand on the 24th. The fourth plea alleged that this giving time was parcel of a contract within the Statute of Frauds; that there was no acceptance wholly or in part, or any earnest, or part payment; and that there was no note or memorandum in writing of it: and the replication traversed its being parcel of the contract.

The principles on which this case must be decided, are clear and admitted. The contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony: for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischief which it was the object of the statute to exclude. Many cases were cited in the argument on both sides, the plaintiff's counsel rely chiefly on *Cuff v. Penn*, 1 M. & S. 21; the defendants on *Goss v. Lord Nugent*, the decision in which it is certainly not easy to reconcile with that in the former. But it seems to us that we are mainly called on to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to, for substituting the 24th for the 22d, as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects, except those of the day of delivery, and date of the accepted bill, with the old one? Where the variation is so slight as in the present case, and the consequences so serious, the mind comes reluctantly to this conclusion; and this reluctance is increased by considering in how many instances of written contracts within the Statute of Frauds, slight variations are made at the request of one or other of the parties, without the least idea, at the time, of defeating the illegal remedy or the original contract. But the same principle must be applied to the variation of a day and a week or a month; and it seems impossible to suppose that, when the plaintiff had agreed to substitute the 24th for the 22d, either party imagined that an action could be brought for a non-delivery on the 22d, or that a delivery on the 24th would not be a legal performance of the contract existing between them.

It was urged by the plaintiff's counsel that the defendant's argument reduced him to an inconsistency; that he alleged, on the one hand, an alteration of the contract by parol, and yet, on the other, asserted that such alteration by parol could not be made. But this is, in truth, to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver, or the partial alteration of a written contract, not under seal by parol agreement; and in contemplation of law, such a contract so altered subsists between these parties: but the statute intervenes, and, in the case of such a contract, takes away the remedy by action. It cannot be said that the time of delivery was not originally of the essence of this contract: the evidence shows that the value of the article was fluctuating; and the time of payment was to be calculated from the time of delivery. Where these circumstances exist, it cannot in strict reason be argued, as

was said by Lord ELLENBOROUGH, in the case of *Cuff v. Penn*, that the contract remained, although there was an agreed substitution of other days than those originally specified for its performance. Nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days; for the same consideration which existed for the old agreement, is imported into the new agreement, which is substituted for it.

Putting, therefore, that construction on what passed between these parties which best effectuates their intention, and giving also full effect, as we ought, to the salutary provisions of the Statute of Frauds, we think that this giving of time was parcel of the contract, and, consequently, that the verdict on the fourth plea should be entered for the defendants.

Rule absolute accordingly. (a)

(a) See *Marshall v. Lynn*, 6 M. & W. 109.

The QUEEN against The Mayor of BRIDGNORTH.—p. 66.

Payment of rates, to entitle a person to be put on the burgess list of a borough, under stat. 5 & 6 W. 4, c. 76, s. 9, must be a payment by the party's own act. It is not sufficient that another person, without his authority, pays the rates for him.

Where a party, required by law, to pronounce a decision on certain points, is brought before the Court by a motion impugning such decision, the general rule is, that he shall have costs if the application fails.

Per Littledale, J. It is not regular to grant a single rule nisi for the issuing of several writs of mandamus.

A RULE nisi was obtained, in Michaelmas term, 1837, for a mandamus to the Mayor of Bridgnorth, to insert the several names of Job Allen, and seventy-seven other persons named by the rule, in the burgess roll of the said borough. The names of these parties had been inserted by the overseers in their lists made in September, 1837, but on the revision, in October, before the mayor and assessors, it was objected, "that none of the said several parties had paid their respective rates themselves, but that the same had been paid for them by third parties." It was contended in answer, that, the rates having been paid, it was immaterial by whom, or in what way the payment was made. The mayor and assessors held it necessary that all rates should be paid directly by the parties themselves, and, therefore, they expunged all the names. William Gittos, described as a law stationer, and stating himself to be an inhabitant, householder, and burgess of Bridgnorth, deposed, in support of the rule, that he did, on 31st August, 1837, pay to the overseers of the proper parishes respectively, all such rates as had become payable by the parties claiming enrolment, for the premises in respect of which they claimed, during 1837, and the two preceding years, except for the last six calendar months. And in a supplemental affidavit he stated that the rates "were all paid by him by the authority and with the knowledge and approbation of such several parties respectively."

The affidavits in opposition to the rule, (which were numerous, and went into much detail,) stated, that the rates had been paid, on the evening of August 31st, by persons who belonged to a political party in the borough, and, as was believed, for political purposes; that the pay

ments had been made to the overseers of the respective parishes, in gross sums covering the amounts due from the parties named in certain lists, and whose claims were now in question; and that the overseers gave receipts for the gross sums to the parties paying, but none to the persons in whose names the payments were made. The affidavits contained very full statements as to the condition in life of these parties, from which, and from their having been unable to pay rates when called upon during the three years in question, as well as from other circumstances, it was inferred that they would not and could not have paid the rates for themselves. Three of the parties deposed that they had not authorized such payments, and did not know of them till after they were made; and others were stated to have made admissions to the same effect.

R. V. Richards now showed cause, and contended that the parties claiming enrolment, had not, under these circumstances, "paid" their rates, within the meaning of stat. 5 & 6 W. 4, c. 76, s. 9.

Jervis, *contrà*, was called upon by the Court. [Lord DENMAN, C. J. We will not inquire into all the titles (a) on this rule.] The general question on which they depend is, whether a party is entitled to be put upon the burgess-roll when another person has paid his rates for him. *Rex v. Lower Heyford*, 1 B. & Ad. 75, (20 E. C. L. R. 351,) has some bearing on this point. [Lord DENMAN, C. J. No: there it was considered by the Court that the rates were, in fact, paid by the party himself. The question here is, whether a voter can be put upon the list, without his knowledge, by another person.] The words of the act are, "unless he shall have paid" "all such rates." The payment on his account is his payment. If the statute had meant that this should not suffice, words expressive of such intention would have been used. It may be said that such payments tend to bribery; but if that offence is committed, there is a remedy. [COLERIDGE, J. Persons are applied to for their rates, and do not pay; then some one comes, and in one evening pays the rates of all in a gross sum, without their knowledge.] That statement applies only to some of the cases. [Lord DENMAN, C. J. Putting the most general case: if a man pays another's rates without authority from him, and as a volunteer, is that a payment by the party rated?] Construing terms strictly, the party does not *pay*; but the act does not require a payment with his own hand. [COLERIDGE, J. Why need those words be used, when the act says "he shall have paid?"] The party does pay if he adopts the payment.

Lord DENMAN, C. J. We ought to promulgate our opinion on this subject without delay. If the practice described were to prevail, there would be great danger of the most enormous bribery. The statute, in requiring that the rates shall have been paid, contemplates some payment by the party's own act. The rule must be discharged.

LITLEDALE, PATTESON, and COLERIDGE, Js., concurred.

R. V. Richards then applied for costs, and urged the expense which had been incurred by including seventy-eight cases in one application.

Jervis, *contrà*. The point was new, and the want of authority, on which this Court has proceeded, was not the precise ground on which the mayor rejected the names. No real disadvantage resulted from including all the cases in one rule.

(a) See *Reg. v. The Mayor of Harwich*, 8 A. & E. 919, (35 E. C. L. R. 560.) Stat. 7 W. 4, and 1 Vict. c. 78, s. 24.

LORD DENMAN, C. J. I say nothing as to the number of cases included in one rule. If the attention of the Court had been directed to the facts when the rule was moved for, probably it would not have been granted in that form. And if an application in each particular case was necessary, it would have been no better for the parties showing cause. But where a person is bound by law to pronounce a decision, and that decision is disputed before us, and proves to be right, he is entitled to costs. That should be the general rule, though I do not say that circumstances may not take a case out of it. This rule must be discharged with costs.

LITTLEDALE, J. The practice of moving for one or more writs of mandamus to be granted by the same rule, should not be drawn into a precedent. It appears, by a note in the possession of Mr. Robinson, that an application was made in 1793 for a rule to be so framed, but this Court said that they never heard of a rule to show cause why one mandamus or more should not issue. (a) I mean to say that this mode of drawing up a rule should not be considered as a matter of course. The rule here must be discharged with costs.

PATTESON and COLERIDGE, JS., concurred.

Rule discharged with costs.

(a) The reporters have been favoured with the note referred to, which is as follows:—

Mr. Perceval moved for and obtained a rule nisi for a mandamus to Samuel Hughes, to take upon himself the office of one of the forty-eight men of Northampton, which was granted.

He then said there were four other persons in the same situation, and although he understood the Court last term to have decided that one mandamus could not comprise more than one person, yet he hoped the Court would permit these five men to be included in one rule nisi.

But the Court said, they sometimes granted a rule to show cause why one or more information or informations should not be granted, but they never heard of a rule to show cause why one or more mandamus or mandamuses should not issue.

And accordingly five rules were taken.

Hilary term, 1793.

DOE on the demise of JOSHUA MAYHEW against ASBY.—p. 71.

In an action of ejectment on a forfeiture by breach of covenant to repair, the Court has no power to stay proceedings upon terms, if the lessor of the plaintiff does not consent.

KELLY, in Michaelmas term, 1837, obtained a rule calling on the lessor of the plaintiff to show cause why all proceedings in this ejectment should not be stayed on payment of costs. The action was brought by reversioner against termor to enforce a forfeiture by breach of a covenant to repair within three months after notice from the lessor or his assigns. Notice had been given to repair in the three months expiring June 18th, 1837; the repairs continuing undone, declarations in ejectment had been served on the 9th of August, and the defendant had entered into the usual consent rule. On November 23d the present rule was obtained. A summons had been previously taken out for the same purpose, and the parties had attended before LITTLEDALE, J., at chambers, November 17th, when the learned judge held, that he had no jurisdiction, and dismissed the summons. The affidavits in support of the rule stated, that the repairs had, at the time of making this application, been done; that the defendant had proposed a meeting between his surveyor and the surveyor for the lessor of the plaintiff, and had offered to execute immediately, under the direction of the

latter, any alteration or amendment which he might propose, and likewise to pay the costs of the action as between attorney and client; but that these proposals had been declined. It was further stated that the defendant held for the residue of a term of sixty-one years, under a lease, dated September 1st, 1789, at a ground rent of 5*l.* per annum, and that the lease was beneficial and of considerable value. The affidavits in answer stated that several important repairs had not been done till after the action was brought; and that some trifling ones still remained to be performed as late as November 10th. *Doe dem. De Rutzen v. Lewis*, 5 A. & E. 277, (31 E. C. L. R. 333,) and an unreported case of *Doe dem. Gover v. Maberly*, were cited in moving for the rule.

R. V. Richards and *Arnold*, now showed cause. This is an application which has never been made to a court of law; and even the courts of equity would not relieve in such a case. The rule in those courts is, that relief by injunction may be granted where the forfeiture attaches by non-payment of a sum of money, the amount of which, with interest, may be calculated by Court; but not where the breach of covenant consists in some other non-feasance, for which the reversioner must claim damages. This subject is very fully discussed, and law laid down as now stated, in *Hill v. Barclay*, 18 Ves. 56. And see 16 Ves. 402. In *Bracebridge v. Buckley*, 2 Price, 200, the Court of Exchequer refused equitable relief in a case of forfeiture by breach of a covenant to lay out 1000*l.* in repairs within a given time; and in *White v. Warner*, 2 Mer. 459, where an injunction was moved for to restrain a landlord from suing at law upon the breach of a covenant to keep premises insured against fire, and the case was represented as one of great hardship, Lord ELDON, C., said that the Court could not give relief against such a forfeiture upon the principle of compensation. The authorities on the subject are collected in Eden on Injunctions, p. 21, et seq. c. 2, and Comyn on the Law of Landlord and Tenant, p. 565, et seq. Book 4, c. 2, s. 3, 2d. ed. The only case in equity of any considerable weight, contradictory to those now cited, is *Sanders v. Pope*, 12 Ves. 282, where, on ejectment brought for a forfeiture by non-repair, Lord ERSKINE, C., granted relief on terms of compensation to the landlord. That case was much discussed in *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 56; and had circumstances of its own, commented upon by Lord ELDON, in *Hill v. Barclay*, 18 Ves. 59, which prevent it from being an authority in the present case. (e) *Hack v. Leonard*, 9 Mod. 91, where relief is said to have been granted in a case of non-repair, is mentioned by Lord ELDON, in *Hill v. Barclay*, 18 Ves. 61, as a loose note, and occurs in 9 Mod., a book of little authority. [LITTLEDALE, J. The ninth Mod. is worse than the tenth.] As to the supposition that clauses of re-entry are to be unfavourably looked upon, Lord TENTERDEN said in *Doe dem. Davis v. Elsam*, M. & M. 189, "I do not think provisoes of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort the provisoes ought to be construed according to fair and obvious construction, without favour to either side." And where the

(e) See also note (83) to *Wadman v. Calcraft*, 10 Ves. 70, 2d ed.

re-entry was for non-payment of rent, this Court, since stat. 4 G. 2, c. 28, has refused between verdict and execution to stay proceedings in ejectment on payment of arrears and costs; *Doe dem. Harris v. Masters*, 2 B. & C. 490, (9 E. C. L. R. 158.) [Lord DENMAN, C. J. In *Doe dem. De Rutzen v. Lewis*, 5 A. & E. 277, (31 E. C. L. R. 333,) which was cited in moving, the reversioner had elected to do the repairs himself and hold the lessee responsible; he had, therefore, waived the forfeiture.] The Court then inquired of

Kelly, who supported the rule, if there were any authority for the interference now claimed. None has been found: but *Doe dem. Gover v. Maberly*, a case determined by the Court of Common Pleas in Hilary term, 1836, was relied upon at the time of moving for this rule. The case is not reported; but it appears that the action was brought upon a forfeiture incurred by non-repair and non-payment of rent, and that the Court, after judgment, ordered the defendant to be replaced in possession upon terms. (a) That seems to be an authority for the present application.

LORD DENMAN, C. J. I am satisfied that the Court of Common Pleas, in the case referred to, must have done no more than put the case in a train of arrangement. If the order had been made in invitum as to the landlord, the decision would probably have been reported. It is quite clear that we have not authority to make the order desired; to do so we ought to have more powers in other respects than we now possess. Supposing that we were willing to make such an order, could we direct an issue, to ascertain whether the repairs were well done or not?

LITLEDAL, J. We have no jurisdiction to make a rule absolute for staying these proceedings. All the authorities which have been cited, except one or two cases, show that such a power does not exist in the present instance.

PATTESON, J. It is quite clear that we have no authority to make this rule absolute. From my note of the motion, I think that we granted the rule nisi under a mistaken impression of the facts. Supposing that we could interfere, it appears that there were repairs still undone when the action was brought.

(a) By the papers in *Doe dem. Gover and Another v. Maberly*, it appears that the forfeiture was incurred by non-repair and non-payment of rent; ejectment was brought, issue joined, and notice of trial given; and the defendant then gave, and the lessor of the plaintiff accepted, a cognovit whereby the defendant agreed to withdraw his plea, and that unless he should pay, on or before December 28, half the plaintiff's costs of the action and of withdrawing the record, and the arrangement to compromise the same, &c., and should pay, on December 28th, half the rent due December 25th, and unless he should pay the remaining halves of the costs and rent on January 28th, and should repair the premises within four months, to the satisfaction of surveyors on each side, and unless defendant within, &c., appoint a surveyor for the purpose on his side, the lessor of the plaintiff was to be at liberty to issue a writ of possession, and also execution for the rent and costs, &c. Defendant failed to perform the stipulated terms by December 28th, and the lessor of the plaintiff signed judgment on December 30th, and had possession delivered by the sheriff. The defendant applied, on summons before a judge at chambers, to have the judgment set aside on terms; the learned judge thought he had no jurisdiction, but stayed proceedings for a time, that application might be made to the full Court. A rule nisi was obtained, January 13th, 1836, for setting aside the judgment, on affidavits alleging surprise, excusing the default, and stating endeavours since made by defendant to complete the arrangement. They also showed that the defendant's lease was beneficial. By a rule of February 1st, 1836, (after hearing Telfourd, Serjt., for the plaintiff, and Wilde, Serjt., for the defendant,) it was ordered, that on payment, within one week, of the debt secured by the cognovit, and costs (as specified in the rule,) possession should be restored to the defendant; and that the judgment should stand as a security for the due performance of the repairs pursuant to the stipulations in the cognovit.

COLERIDGE, J. The strongest way in which this case could be put for the tenant would be, to show that the affidavits disclose something which might have been an answer to the action. But they do not. and if they did, we could not try the question on affidavits.

Rule discharged.

FAULKNER against CHEVELL.—p. 76.

Debt for penalties, under stat. 22 G. 2. c. 46, s. 14, for acting as attorney at the sessions of the peace where defendant "executed the office" of deputy clerk of the peace. Plea, Not Guilty. Held, that plaintiff was bound, upon this issue, to prove the actual exercise of the office by defendant; and that a finding by the jury, that defendant "had never acted" as such deputy, negatived the charge in the declaration.

The town clerk, to whose office that of clerk of the peace had usually been incident, appointed defendant his deputy in the office of town clerk. Held, that, for the purpose of this action, defendant was not deputy clerk of the peace; and semble, that even if the appointment made him such deputy, he was not liable to the penalties, if he abstained from acting, and the duties of clerk of the peace were always performed by the principal in person.

DEBT for penalties under stat. 22 G. 2, c. 46, s. 14.

The declaration stated that one Harris was clerk of the peace of the town of Cambridge, and defendant his deputy as such clerk of the peace. That defendant, being such deputy, within the space of twelve months before the commencement of the suit, at the general quarter sessions of the peace holden in and for the said town in June 1834, being the town where defendant executed his office of such deputy, acted and presumed to act as attorney for one J. D., by then, at the said sessions, as the attorney of and for the said J. D., conducting the prosecution of a certain indictment against one F. H., at and upon the trial of a certain issue joined on the said indictment, and which issue was then tried at the said sessions, contrary to the form of the statute, &c., whereby defendant forfeited the sum of 50*l.*, &c. There were six other counts for six other penalties. Plea, Not Guilty.(a)

At the trial before PARK, J., at the Cambridge Lent assizes, 1837, it was contended, on the part of the plaintiff, that the plea admitted Harris to be clerk of the peace, and defendant his deputy. The learned judge ruled otherwise. The plaintiff then proved the appointment of Harris, in 1833, to the office of town clerk of the borough of Cambridge, to be exercised by himself or deputy so long as he should demean himself properly in the said office, and in the execution of the "duties incident thereto;" together with all fees, profits, &c., "in as ample and beneficial a manner as any other person or persons, theretofore holding and using the said office, held and enjoyed the same." The deputation by Harris to defendant recited his own election as town clerk, and appointed defendant to be his deputy "in the office of town clerk of the said borough, to have, hold, use, exercise, and enjoy the office of deputy

(a) See *Faulkner v. Chevell*, 5 A. & E. 218, (81 E. C. L. R.)

town clerk of the said borough," for the same time and on the same tenure as Harris himself. Evidence was then adduced to show that the office of clerk of the peace was incident and united to that of town clerk; that the town clerks had, for many years, usually performed all the duties of clerk of the peace without any separate appointment, and that the deputy town clerk was, as such, also deputy clerk of the peace. It appeared that the justices at the sessions acted as such under commissions of the peace for the town, and were not charter justices.

On the part of the defendant, it was proved that he confined himself to the duties of town clerk, and Harris always officiated in person at the sessions as clerk of the peace. An appointment of Harris as clerk of the peace, in 1830, by the Duke of Rutland, who claimed to be *custos rotulorum* for the town, was also produced; but the legality of the appointment by the duke, and the duke's title to be *custos rotulorum*, were denied by the plaintiff. It was admitted that defendant had acted as attorney upon the occasions referred to in the declaration.

The jury, being asked by the learned judge, "whether the defendant had ever acted as deputy clerk of the peace," found that he had not; whereupon plaintiff was nonsuited, with leave to move to enter a verdict for him for such penalties as the court should think proper.

In the following Easter term, *Kelly* obtained a rule nisi according to the leave reserved, and now

Biggs, Andrews, and Byles, showed cause.—The point respecting the effect of the plea of not guilty is decided by *Earl Spencer v. Swannell*, 3 M. & W. 151.(a) [*Kelly*, contra, gave up this point.] There was no proof either that defendant was deputy clerk of the peace, or that he executed the office of such deputy. Both should have been proved in order to fix him with the penalties of the act,(b) whereas the latter allegation, which is necessarily inserted in the declaration, was expressly negatived by the jury. The clerk of the peace is the officer of the justices, and removable by them; 1 W. & M. sess. 1, c. 21, s. 6. The town clerk is an officer of the corporation. The two offices are therefore distinct, though they may happen to be united in one person, who may appoint a deputy for either office. Here, the appointment of deputy was in terms confined to the office of town clerk, which may be exercised concurrently with the business of an attorney. The mischief of the act is avoided; for, as the defendant never acts as clerk of the peace, it can never devolve on him to tax his own bills for business done as attorney.

Kelly and Gunning, contra.—The weight of evidence was in favour of the conclusion that the two offices had been invariably held by one person, and that the appointment of a town clerk made him, ipso facto,

(a) See also *Jones v. Williams*, 4 M. & W. 375.

(b) Stat. 22 G. 2, c. 46, s. 14, is as follows: "And, to the end that justice may be impartially administered in the several general or quarter sessions of this kingdom, be it further enacted by the authority aforesaid, that no clerk of the peace, or his deputy, nor any under sheriff or his deputy, shall, from and after the said 29th day of September, act as a solicitor, attorney, or agent, or sue out any process, at any general or quarter sessions of the peace to be held for such county, riding, division, city, town corporate, or other place within this kingdom, where he shall execute the office of clerk of the peace, or deputy clerk of the peace, under sheriff, or deputy, on any pretence whatsoever; but if any clerk of the peace, or his deputy, or any undersheriff, or his deputy, shall presume to act as a solicitor, attorney or agent as aforesaid, such clerk of the peace, or his deputy, undersheriff, or his deputy respectively, shall be subject and liable to a like penalty of 50*l.*, to be recovered in manner aforesaid."

clerk of the peace. The clerk of the peace is not of necessity appointed by the *custos rotulorum*, for stat. 37 Hen. 8, c. 1, s. 5, reserves the right of corporations and others to appoint to that office, where they lawfully enjoyed it at the passing of the act. As the town clerk was, *virtute officii*, clerk of the peace, a deputation of the former office necessarily made the defendant a deputy in the latter also; and it matters not that the appointment was restrained to the office of town clerk, for a deputy cannot be appointed with a less power than his principal; *Parker v. Kett*, 1 Lord Ray. 658; S. C. 1 Salk. 95. As to the finding of the jury, the word "act" does not occur in the statute, but the word "execute." An office is executed, in point of law, by the person who has been legally appointed to it, and the acting of the principal as clerk of the peace (which is admitted) is in law the acting of the deputy. It is mere matter of private arrangement, which shall do an act which either may officially execute; and if the practising as an attorney may be legalized by a mere voluntary abstinence from performing the duties of the office, it is evident that the provisions of the act may be eluded by a juggle. *Hughes v. Statham*, 4 B. & C. 187, (10 E. C. L. R.,) shows that the statute cannot be evaded by an arrangement indirectly defeating its object. In *Stanley v. Dodd*, 1 Dowl. & Ry. 397, (a) it was held that a party who was qualified to be a guardian of the poor by reason of an estate, and who thereby became a guardian, *ipso facto*, by virtue of a local act, was liable to a penalty for supplying goods to the poor under 55 G. 3, c. 137, s. 6, although he was not proved to have acted as guardian.

LORD DENMAN, C. J.—This rule must be discharged and the nonsuit stand. The declaration properly alleges, that the defendant executed the office of deputy clerk of the peace, but the evidence does not support the allegation. There was no sufficient evidence that the defendant was deputy clerk of the peace, and none at all that he acted in that capacity. I cannot assent to the doctrine, that the acting of Harris was the acting of his deputy, especially as the declaration mentions both the deputy and the principal, and must be therefore taken to mean an acting by the former and not by the latter. The defendant may have accepted the office of deputy town clerk without any intention on the part of himself or of his principal that he should perform the duties of clerk of the peace. Where the two offices happen to be united in the same person, there is certainly some danger that the provision of the legislature may be evaded by a private arrangement between the principal and his deputy; but we must adhere to the words of the statute, which are clear. The decision in *Stanley v. Dodd*, 1 Dowl. & Ry. 397, (16 E. C. L. R.,) is founded on language very different from that used in 22 G. 2, c. 46, and is therefore inapplicable here.

LITLEDAL, J.—The appointment distinctly makes the defendant deputy town clerk, and not deputy clerk of the peace. The defendant is not shown to have filled the latter office at all.

PATTESON, J.—I am not satisfied that the defendant filled the office of deputy clerk of the peace. The two offices held by Harris are not one and the same office, but different ones filled by the same person. The defendant may lawfully be appointed deputy as to one, and not as to the other. Even if he held the office, he never executed the duties

(a) And see *Stanley v. Dodd*, 2 Dowl. & Ry. 809.

of it within the meaning of the statute. The stat. 55 G. 3, c. 137, s. 6, provides that goods shall not be supplied by overseers or others "in whose hands" the management, &c., of the poor "may be placed" in any parish "for which he or they shall be appointed as such, during the time which he or they shall retain such appointment." This language is very different from that of 22 G. 2, c. 46, s. 14.

COLERIDGE, J.—The plaintiff must prove an acting as deputy clerk of the peace at the sessions or place where he is alleged to have acted as an attorney. It is a new doctrine to maintain that an acting by the principal is an acting of the deputy. There are many cases in which the act of the deputy is the constructive act of the principal; but the converse does not hold.

Rule discharged.

WILSON against RAY.—p. 82.

Plaintiff being about to compound with his creditors, defendant, a creditor, refused to subscribe the deed unless he were paid in full. Plaintiff, to obtain his signature, gave a bill, payable to defendant's agent, for the difference between 20s. in the pound and 8s., the proportion compounded for. Defendant then signed the deed. Plaintiff did not honour the bill when due; but, on subsequent application, he paid it, some months after the dishonour, by two instalments, to the payee, and defendant received the money. The other creditors were paid according to the deed.

Held, that plaintiff could not recover back the amount paid to defendant above 8s. in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be re-opened. And that it made no difference that the sum in question had not been recovered by action.

ASSUMPSIT (declaration of 22d November, 1836) for money had and received, and on an account stated. Plea, non assumpsit. On the trial before Lord DENMAN, C. J., at the sittings in London after Easter term, 1837, it appeared that the plaintiff, on May 6th, 1833, compounded by deed with his creditors, one of whom was the present defendant. The defendant, when requested to subscribe the deed, had refused to do so unless he had 20s. in the pound; and the plaintiff, to obtain his signature, accepted a bill of exchange drawn for this purpose by William Preston, the defendant's clerk, dated April 3d, 1833, for the payment, at nine months, of 29l. 16s., the difference between 8s. and 20s. in the pound on the defendant's debt. The bill was not honoured when due, but, on subsequent application, the plaintiff paid the amount by two instalments, in February and May, 1834, to Preston, who placed the amount to the plaintiff's credit with the defendant. The 8s. in the pound was also paid. (a) The plaintiff went on dealing with the defendant and receiving goods from him, till the expiration of some months after the last instalment was paid. The defendant's counsel objected that, the payment having been voluntary, this action did not lie. The lord

(a) It was stated in the course of discussion, when the after-mentioned rule was moved for that all the creditors were paid 8s. in the pound.

chief justice thought otherwise, but reserved leave to move to enter a nonsuit, and the plaintiff had a verdict for 29*l.* 16*s.*

Kelly, in Trinity term, 1837, moved for a rule to show cause why a nonsuit should not be entered. This action is grounded on a misconception of *Cockshott v. Bennett*, 2 T. R. 763, and other cases. It is true that if, in the present case, Ray had been holder of the bill and attempted to enforce payment of it by action, the circumstances under which it was extorted would have been a good defence; or if Ray had negotiated the bill to a bonâ fide holder, who had sued Wilson upon it, Wilson would have been without defence in such an action, but might have had his action over against Ray for the amount recovered against himself: *Smith v. Cuff*, 6 M. & S. 160. But here the bill had not been negotiated, and all the facts show that the payment was voluntary [Lord DENMAN, C. J. The payee might at any time have placed the bill in the hands of a bonâ fide holder.] It was still in his own hands when paid. [Lord DENMAN, C. J. The fact was, that the plaintiff paid it rather than lose the credit which he had with Ray.] The payment was made voluntarily and with knowledge of the facts; this case, therefore, falls within the principle laid down upon the subject in *Brisbane v. Dacres*, 5 Taunt. 143, (1 E. C. L. R. 43.) [Lord DENMAN, C. J. Nothing unlawful was done there; the parties only mistook their rights.] In *Took v. Tuck*, 4 Bing. 224, (13 E. C. L. R. 407,) (a), where the defendant had compounded with his creditors, (but it did not appear to what extent the composition had been carried into effect;) and some time after that arrangement the defendant gave a bond for the whole amount of his debt to one of the creditors, the Court of Common Pleas held that such bond might be enforced, though it would have been otherwise if a bond or agreement to the same effect had been entered into before or at the time of the composition. Here the bill was given in pursuance of an original unlawful contract; the unlawfulness consisted in the undue pressure upon the debtor at the time of making the agreement; but the bill was paid under no unlawful pressure. Ray had not then the power, as a creditor, of enforcing any right against Wilson, or withholding any benefit from him; there was nothing to deter Wilson from availing himself of any protection the law might give him against Ray; therefore he made the payment voluntarily. He went on dealing with Ray for some time afterwards, and more than two years passed before this action was commenced. [PATTESON, J., mentioned *Turner v. Hoole*.] (b) Lord KENYON held, in *Fulham v. Down*, 6 Esp. N. P. C. 26, note, "that where a voluntary payment was made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity, (or as expressed by Mr. Bearcroft, unless to redeem, or preserve your person or goods,) it is not the subject of an action for money had and received. The law, if so held, would subject all accounts and settlements between parties to revision." [PATTESON, J. It does not appear that the payment in that case would have been in fraud of any third party.] Here every creditor had been paid the amount of his composition.

A rule nisi was granted. In this term, (April 30th,)

Platt and *R. V. Richards* showed cause. In the cases where it has

(a) See *Tuck v. Took*, (S. C. in Error,) 9 B. & C. 437, (17 E. C. L. R. 412.)

(b) *Dowling & Ryland's Nisi Prius Cases*, (usually annexed, as a supplement, to 2 D. & R.) 27, (16 E. C. L. R. 418.)

been held that money voluntarily paid should be retained by the party receiving it, there was no fraud in the first instance. Here the bill was given to Ray in fraud of the other creditors; no right could be acquired by such fraud, and the 29*l.* 16*s.* never ceased to be the money of Wilson. The payment here was not in any sense voluntary; there appears to have been an urgency, the plaintiff paying an instalment before he had means to pay the whole. *The Duke de Cadaval v. Collins*, 4 A. & E. 858, (31 E. C. L. R. 206,) is, in principle, not distinguishable from this case. [Lord DENMAN, C. J. It would be more like if Ray had obtained the money when he executed the deed. The question here is, why Wilson could not as well have resisted the demand upon the bill as bring this action.] In *The Duke de Cadaval v. Collins*, the lord chief justice, after stating the real question to be, whether the money is still the plaintiff's, adds, "How is it shown not to be so? Why, by striving to give effect to a fraud." "This case differs from all which have been cited as being otherwise decided: in none of those was the *bonâ fides* negated." The same argument decides the present case. That the original transaction here was invalid, results from all the cases, beginning with *Cockshott v. Bennett*, 2 T. R. 763. In *Smith v. Cuff*, 6 M. & S. 160, the plaintiff had paid the bill, in the hands of a *bonâ fide* holder, against whom he could have no defence; and here, Wilson would have been similarly situated in an action brought by Preston, unless he could have identified Preston with Ray. *Turner v. Hoole*, D. & R. N. P. C. 27, (16 E. C. L. R. 418,) decides the present case. There the defendant, having, with other creditors of the plaintiff, executed a composition deed, afterwards induced the plaintiff to accept bills to the full amount of his demand, which, though dated before, were drawn after the execution of the deed. The plaintiff paid the bills, after legal proceedings had been taken against him, and then brought an action of money had and received for the difference between what he had so paid and the composition secured by the deed; and ABBOTT, C. J., held, at *nsi prius*, that the defendant was liable to refund that surplus, the transaction being a fraud, either upon the insolvent or upon the other creditors. [Lord DENMAN, C. J. I do not see how it was a fraud, being subsequent to the composition.] *Turner v. Hoole* was relied upon as law by the Court of Common Pleas in *Alsager v. Spalding*, 4 New Ca. 407, (33 E. C. L. R. 393.) In *Coleman v. Waller*, 3 Y. & J. 212, the principle of *Cockshott v. Bennett* was extended to the case where a creditor, as the consideration for his entering into a composition deed, obtained, not from the debtor but from a third person, security for his whole debt. *Hills v. Street*, 5 Bing. 37. (15 E. C. L. R. 358,) is among the instances which show what may be considered compulsory payments, though not enforced by actual process of law. The Courts have always been anxious, in the case of composition deeds, to preserve complete *bonâ fides* among the creditors.

Kelly, *contrâ*. If there had appeared in this case either fraud, extortion, duress, or any kind of compulsion, the defendant could not retain the sum now claimed. And it may be admitted that if he had sued upon the bill he could not have recovered, the giving of it being an *undue preference*. The single authority of *Turner v. Hoole*, is against the defendant; but that, if rightly reported, appears to be bad law; and is contrary to all the other decisions. [Lord DENMAN, C. J. I feel no

difficulty except from that case. Perhaps we had better take time to look into it. The antedating there seems to connect the transaction with some fraud.] The plaintiff there should have resisted the proceedings commenced against him. But perhaps it may have been thought that, as the proceedings were upon bills of exchange on which something (namely, the amount of the composition) was confessedly due, the insolvent was not called upon to defend, and might resort to his cross action. [PATTESON, J. He might have resisted pro tanto.]

The case stood over, and to-day,

Lord DENMAN, C. J., (after reading aloud the case of *Turner v. Hoole*, and consulting the other judges) said :

This rule must be made absolute. The case which we wished to have more fully before us is undoubtedly a case in point against the present defendant, but the defence here relied upon was not presented to Lord TENDERDEN. He considered that case, as I on the trial considered the present case, to be decided by the principle clearly laid down in *Cockshott v. Bennett*, often recognised and never impeached ; but he was not reminded of another principle of at least equal importance, which was established in *Marriott v. Hampton*, 7 T. R. 269, that what a party recovers from another by legal process, without fraud, the loser shall never recover back by virtue of any facts which could have availed him in the former proceeding. Money so recovered was not received to the plaintiff's use : it was received to the use of the successful party by authority of law. If any error was committed in the former proceeding, still the plaintiff is estopped from proving it after failing to do so at that time. If this were otherwise, the rights of parties could never be finally settled by the most solemn proceeding ; and verdicts and judgments might be rendered nugatory by evidence which, if produced at the proper season, might have received a complete answer. The *Duke de Cadaval's* case was not intended to be, nor is it, inconsistent with this doctrine. It turned on fraud and extortion practised by an abuse of ex parte legal process by one who knew that he had no right to the money he obtained. That money still remained the property of the Duke, though unjustly taken out of his possession. But where the recovery is by legal process, the loser never can contend that the property is his.

I am reminded by my brother PATTESON that in the present case no action was brought on the bills in question, but they were voluntarily paid after they became due. I think the same principle applies. This plaintiff might have then refused payment, and if the defendant's agent, the drawer, had brought his action on the acceptance, he had the opportunity of defending himself by the illegal nature of the consideration. He waived the advantage, and voluntarily paid the bills with full knowledge of all the facts. I am of opinion that it is not now open to him to deny that he was liable on them.

LITTLEDALE, J. I am entirely of the same opinion, and I think the circumstance just adverted to makes no difference.

PATTESON and COLERIDGE, Js., concurred.

Rule absolute.

GREGG against WELLS.—p. 90.

The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bona fide, cannot recover them from the vendee.

G., the owner of the fittings of a public-house, demised them to D., who, thereupon became tenant of the house to a third party, under an agreement which gave his landlord a lien on the fittings. G. was present at the execution of such agreement. D. afterwards sold the good will and fittings, without G.'s knowledge or assent, to W., who being told by the landlord that D. was his tenant, bought them bona fide, in ignorance of G.'s title, and was accepted by the landlord as tenant in the place of E.

Held, that G. could not maintain trover for the fittings against W. And that the defence was admissible on the plea of *not possessed*.

TROVER for goods, being the fittings and furniture of a public house. Pleas, 1. Not guilty. 2. Plaintiff not possessed of the goods as of his own property.

On the trial before Lord DENMAN, C. J., at the Westminster sittings after Trinity term, 1837, it appeared that, in 1835, plaintiff bought the good will, fittings, &c., of the public-house, and put in Heath, a relation, as tenant, in whose name the business was carried on, and the requisite licenses were transferred. The premises belonging to Messrs. Elliott & Co., brewers, who accepted Heath, as tenant, from year to year, at the rent of seventy guineas. As the business proved unprofitable, Heath gave it up; and plaintiff, in January, 1836, entered into the following agreement, with one Durham: "Memorandum of agreement, made this 2d day of January, 1836, between William Henry Gregg, of the one part, and Alexander Durham, of the other part. The said W. H. Gregg hereby agrees to let, and the said A. Durham hereby agrees to take the public-house, called," &c., "with the fittings up of the same, and the several fixtures and things now in and upon the same, to hold to the said A. Durham, from Christmas last, for one year, at the yearly rent of 90*l.*, payable quarterly on the usual days; and the said A. Durham agrees to pay the said rent, and all taxes and outgoings, including sewer, rate, and land tax, and to keep all the premises in good and substantial repair, to use the said premises as a public house, and for no other purpose; and will do every thing to preserve the same as a public-house, and duly licensed as the same now is; to take due care of and preserve all the fixtures and fittings up, now in the said premises, and, at the expiration of one year, surrender the same in good preservation, together with the said premises, unto the said W. H. Gregg: provided always, the said A. Durham shall be at liberty to purchase all the interest and right of the said W. H. Gregg, in and to the said premises, fittings up, and fixtures, and the license thereof, at any time during the said twelve months, for which the same are agreed to be let, for the sum of 280*l.*; and upon payment of the said sum of 280*l.*, this agreement shall be at end, except that the said A. Durham shall be liable to pay a proportion of rent up to the time of the payment of the said purchase-money. In witness," &c.

Plaintiff handed to Durham an inventory of the furniture, including the goods in question, being the original inventory which he had him-

self received, when he bought the same in 1835. Plaintiff and Durham then went to Messrs. Elliott, who, upon being paid by the plaintiff the balance of Heath's account, agreed to accept Durham as their tenant, from year to year, at the same rent of seventy guineas. The written agreement entered into on this occasion, between Messrs. Elliott and Durham, provided "that Durham should quit upon notice at the end of any three months, and should then deliver up his licenses to such persons as Messrs. Elliott should appoint, and that whenever Durham should quit, all arrears of rent, taxes, or other moneys due to Messrs. Elliott *should be deducted by the brokers from the valuation of the goods and effects of Durham*, and paid to Messrs. Elliott." Gregg, the plaintiff, was present at the signing of this agreement, on which occasion a change in the time of its commencement was made; but he was not known to, or recognised by Messrs. Elliott, except as a friend of Heath, on whose behalf they supposed that he acted; nor were they acquainted with the agreement between plaintiff and Durham. Durham took possession, insured the premises, and carried on business in his own name; he paid the ground rent to Messrs. Elliott, and obtained receipts in his own name, made considerable alterations in the fittings, and in every respect appeared to be, and acted as owner and tenant of the property until October, 1836, when he advertised the good will and furniture for sale, and eventually, (October, 1836,) sold the same to the defendant. Defendant had been previously referred by Durham to Messrs. Elliott, who informed him that Durham was their tenant. Defendant was then admitted tenant by Messrs. Elliott, in the place of Durham. At the expiration of the year of Durham's agreement with the plaintiff, the latter demanded the furniture, fittings, &c., of the defendant, to whom he had previously (but not until after the purchase by defendant, and substitution of him as tenant, to Messrs. Elliott) notified that they belonged to him. Defendant refused to deliver them. There was no proof that plaintiff knew of, or sanctioned, the sale by Durham to defendant, or that defendant was not a *bonâ fide* purchaser from Durham, in ignorance of any claim or title of the plaintiff.

The lord chief justice told the jury that, if they were satisfied the plaintiff had so allowed Durham to deal with the property as to hold him out to the world as the owner of it, and the defendant had been thereby induced to purchase it *bonâ fide*, in the belief that it was Durham's, then the defendant was entitled to a verdict. The jury found for the defendant.

In Michaelmas term following, *Plutt* obtained a rule nisi for a new trial, on the ground of misdirection and insufficiency of evidence.

Sir *F. Pollock* and *Chambers* now showed cause. There was evidence that the plaintiff was privy to the contents of the agreement between Messrs. Elliott and Durham, and permitted Durham to assume the character of tenant to them, and owner of the fixtures and furniture. When he saw the landlords calculating on the value of the effects on the premises as a security for arrears due to themselves, it was his duty to inform them that the effects did not belong to their tenant. In concealing from them the state of things between him and Durham, he enabled the latter to obtain a credit with them, and with others who might deal with him, which he would not otherwise have had. *Pickard v. Sears*, 6 A. & E 469, (33 E. C. L. R. 115,) is in point, and establishes the general principle, that one who, by his language or conduct, wilfully

causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own position, cannot afterwards aver a different state of things against the party whom he has misled. *Hunsden v. Cheyney*, 2 Vern. 150, and *Hill v. Gray*, 1 Stark, N. P. C. 434, are to the same effect. There is no distinction in principle, although the party who enables another to assume the credit of ownership, may not be actually present when the act is done by which the third party is deceived; nor is it material here that the title to the property may have been really vested in Gregg at the time of the sale by Durham, and that the latter may have deceived Gregg; for where one of two persons is to lose by the fraud of a third, it is fit that he should be the loser who has put the fraudulent party in a condition to practise the imposition. On this ground it has even been held, that if the bailee of goods deliver them to a stranger, the bailor cannot bring trover against the stranger; Bro. Ab. *Tresp.* pl. 216, cited 7 Bac. Ab. 803, *Trover*, C, (a) although this case cannot, perhaps, be supported in its full extent. *Hern v. Nichols*, 1 Salk. 289, and *Hartop v. Hoare*, 1 Wilson, 8, recognise the same principle. [PATTESON, J. There are cases in which a defendant has been allowed to set off a debt due from a party in the apparent possession or ownership of goods against a demand by the real owner.] (b) The facts here would enable the defendant to maintain an action on the case for deceit against the plaintiff, if he were now obliged to give up the property to him. Com. Dig., *Action upon the Case for a Deceit*, (A 8,) (A 10;) *Pilmore v. Hood*, 5 New Ca. 97, (35 E. C. L. R. 43:) so that it would tend to circuity of action, if the plaintiff were now permitted to recover.

Platt and Knowles, contra. It is not denied that the goods really belonged to the plaintiff. He ought, therefore, to recover for them, unless actual misconduct on his part can be proved. It does not follow that Gregg knew the contents of the whole agreement between Messrs. Elliott and Durham, merely because he appears to have been privy to an alteration in one of its terms. Even if he knew the contents of it, a case of fraud is not established; for it is not to be presumed that Durham had no other "goods and effects" from which a deduction might be made; and, supposing that Gregg's goods were intended, yet, as the agreement between him and Durham provided that these should become the property of Durham, on payment of 280*l.* during the year, there was no deception, nor representation inconsistent with what might have been eventually the fact. Besides, the misrepresentation, if any, was to Messrs. Elliott, and not to the defendant. In *Pickard v. Sears*, 6 A. & E. 469, (33 E. C. L. R. 115,) the mortgagee, who brought the action, had made himself a party to the sale, and had sanctioned it. The rule of law must prevail in favour of the real owner, unless the Court shall decide that he was bound, on an attempt of the lessee to deal with the goods, to take active measures for notifying and asserting his claim. Nothing but a sale in market overt will bar the true owner. *Wilkinson v. King*, 2 Camp. 335; *Loeschman v. Machin*, 2 Stark. N. P. C. 311, (3 E. C. L. R. 359.) Furniture, demised with the premises, will not pass to the assignees of the lessee, because a third party ought not to presume that it belongs to the tenant. [PATTESON, J. A distinction

(a) 7th ed. The citation in Bacon is incorrect. In Bro. Ab. it is only said that *trespass* will not lie.

(b) See *Carr v. Hinchliff*, 4 B. & C. 547, (10 E. C. L. R. 406.)

has been made between ordinary furniture, and furniture used in the bankrupt's trade and business. (a) Lord DENMAN, C. J. It is always a question of fact, and not of law, whether goods are in the order and disposition of the bankrupt.] At all events, the plea should have been special, and not a mere denial of the plaintiff's property, which is undisputed. The mere possession of Durham gave no right to convey to the defendant; *Jaulley v. Britten*, 4 New Ca. 242, (33 E. C. L. R. 342;) whereas, the plaintiff's interest gives him a *primâ facie* title to recover. [COLERIDGE, J. In *Owen v. Knight*, 4 New Ca. 54, (33 E. C. L. R. 207,) the facts stated in the third plea, viz., that the plaintiff had delivered the indenture to one Feary, to raise money on it, and he had pledged it to the defendant, were held to be admissible on the second plea of "not possessed." In that case, too, the defendant was allowed to set up a lien, although the agent, Feary, had exceeded his authority, and the plaintiff had not been directly a party to any misrepresentation to, or deception upon, the defendant.] There the plaintiff, at all events, delivered the lease to Feary for the purpose of parting with the possession of it as a security for a loan, although the precise directions given to him were not pursued.

LITLEDALE, J. There are two questions: first, was the direction to the jury right? I am of opinion that it was, and that the case falls within the rule laid down in *Pickard v. Sears*, 6 A. & E. 469, (33 E. C. L. R. 115.) Next, was the verdict supported by the evidence? On this head there was certainly evidence to go to the jury, and I cannot say they were wrong.

PATTESON, J. The direction was right, and the facts support the verdict. The goods are demised with the premises by the plaintiff to Durham for one year, with liberty to purchase the plaintiff's interest in them within that period. I am far from saying that this alone would have given Durham any authority to sell the goods; but Durham then becomes tenant to Messrs. Elliott, under an agreement at variance with the former one, and entered into in the presence of the plaintiff himself, containing a clause to enable Messrs. Elliott to deduct arrears, due from Durham, from the valuation of his goods and effects. The plaintiff does not then say a word about his own title to the goods. Had Messrs. Elliott been the defendants, the point would have been identical with that in *Pickard v. Sears*. Here the defendant is referred by Durham to Messrs. Elliott, by whom he is told that Durham is their tenant. The error is, therefore, one entirely originating in the fault of the plaintiff, who held out Durham as owner, through the medium of Messrs. Elliott.

COLERIDGE, J. Suppose the action had been between the plaintiff and Messrs. Elliott; the latter would have had good ground for believing Durham to be the owner in consequence of the plaintiff's representation. If so, then Messrs. Elliott have a title as against the plaintiff, which they can convey to the defendant. As between the plaintiff and Messrs. Elliott, the plaintiff is known only as the friend of Heath, the previous tenant; and he stands by, without interposition or objection, whilst Messrs. Elliott and Durham become parties to an instrument which gives Messrs. Elliott the right of interfering with the furniture of the house under certain circumstances. It is through the act, or the silence of the plaintiff, that Durham is thus enabled to hold himself out as the owner.

(a) See *Lingham v. Biggs*, 1 B. & P. 82. 88.

Lord DENMAN, C. J. *Pickard v. Sears* was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in the action against the person whom he has himself assisted in deceiving. The defence here is, in substance, collusion between Durham and the plaintiff. As to the evidence, I think a second jury would find the same verdict, and would be justified in finding it.

Rule discharged.

DAVIES against WILKINSON.—p. 98.

Promise in writing, as follows :—

"I agree to pay D. 695*l.* at four instalments, viz., the first on," &c., "being 200*l.*;" and so on, specifying three others, the four amounting to 600*l.*; "the remainder, 95*l.*, to go as a set-off for an order of R. to T., and the remainder of his debt owing from D. to him."

Held, not a promissory note, for such note must be entire, and this instrument contained a promise to pay, joined with an agreement for something else. But,

Held good evidence of an agreement to pay, in consideration of being found indebted on a statement of account; though no consideration was expressly stated on the instrument itself.

ASSUMPSIT. The first count stated that plaintiff and defendant, on the 7th June, 1833, came to an account of and concerning divers moneys due and owing by defendant to plaintiff, and then unpaid, and upon that account defendant was found indebted to plaintiff in a large sum, viz. 695*l.* of lawful, &c., and being so found indebted, he, defendant, in consideration thereof, then, viz. on, &c., agreed and promised to pay to plaintiff or his order the said sum of 695*l.*, at four instalments; viz., the first instalment, being 200*l.*, on Monday then next, 10th June, in the year last aforesaid; the second instalment, being 150*l.*, at a certain day, time, or period then to come, and described as the settling day at Doncaster, after the St. Leger, in the year last aforesaid; the third instalment, being 150*l.*, at a certain other day, time, or period then to come, and described as the settling day after Epsom, 1834; and the fourth instalment, being 100*l.*, at a certain day, time, or period then to come, and described as the settling day at Doncaster, in the year 1834; and that the remainder of the said sum of 695*l.*, being 95*l.*, should go as a set-off for an order of one Mr. Reynolds to one Mr. Thompson, and the remainder of the debt owing from plaintiff to him, the said Mr. Thompson. Averment, that the day, time, or period described as the settling day at Doncaster arrived and took place after the making of the said promise of defendant, and before the commencement of this suit, viz. 18th September, 1833; that the day, time, or period described as the settling day after Epsom, 1834, arrived and took place after the making, &c., and before the commencement, &c., viz. 3d June, 1834; and that the day, time, or period described as the settling day at Doncaster, 1834, arrived and took place after the making, &c., and before the commencement, &c., viz. 17th September, in the year last aforesaid; and that all the days, times, or periods on and at which respectively the said four several instalments of 200*l.*, 150*l.*, 150*l.*, and 100*l.*, of the said sum of 695*l.*, were to be paid, have long since elapsed. Breach, that although defendant, in part performance of his said promise, did pay to plaintiff the said first instalment of 200*l.* on the 10th June, 1833, aforesaid, yet he has not

further regarded his promise, but has disregarded the same, and has not paid to plaintiff the said several other instalments of 150*l.*, 150*l.*, and 100*l.* of the said sum of 695*l.*, or any of them, or any part thereof; and the same, amounting in the whole to a large sum, viz. 400*l.*, still are and each of them is wholly due and unpaid, contrary to the tenor and effect of the said promise of defendant, and in breach thereof. The second count was on an account stated, in the common form.

Pleas. 1. Non assumpsit. 2. That before the making of the promises, and before either of the accounts was stated, viz. on, &c., and on divers other days, &c., defendant lost to plaintiff, and plaintiff then won of defendant, divers sums of money, in the whole amounting to a large sum, viz. 700*l.*, by betting on certain horse-races which were then run, and that each and every of the bets by which the said moneys were so won and lost as aforesaid exceeded the sum of 10*l.*; and that the said accounts were respectively come to and stated, and the promises in the declaration mentioned were respectively made, for and in respect of the said moneys so lost by and won of defendant as aforesaid, and not on any other account, or in any other manner whatsoever. Verification. Replication to this plea, denying that the accounts were come to or stated, or the promises made, for or in respect of moneys lost by or won of defendant by betting on horse-races for sums exceeding 10*l.*, in manner and form, &c. Conclusion to the country. Issue thereon.

On the trial before LITTLEDALE, J., at the Middlesex sittings in Michaelmas term, 1837, the plaintiff gave in evidence the following document, signed by defendant, bearing an agreement stamp:

"I agree to pay to Mr. Charles Davies, or his order, the sum of 695*l.*, at four instalments; viz. the first instalment to be paid on Monday next, June 10th, 1833, being 200*l.*: the second on the settling day at Doncaster after the St. Leger, being 150*l.*: the third on the settling day at Doncaster, after Epsom, 1834, being 150*l.*: and the fourth on the settling-day at Doncaster after the St. Leger, 1834, being 100*l.*: the remainder, 95*l.*, to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. Davies to him.

(Signed)

"James Wilkinson."

The defendant's counsel objected, first, that the instrument was a promissory note, and should have been stamped accordingly, to which point he cited *Green v. Davies*, 4 B. & C. 235, (10 E. C. L. R. 319.) Secondly, that it varied from the first count, inasmuch as it did not show any debt or statement of account prior to the agreement; and that it did not support the second count. Thirdly, that the instrument showed no consideration for the promise. The learned judge received the evidence, but reserved leave to move to enter a nonsuit. Evidence was then given of money having been lent by plaintiff to defendant some time before the making of the promise. The defendant, in support of his second plea, gave evidence of a betting account stated between the parties at a more recent period, in consequence of which, it was said, the undertaking in question was given. The learned judge left it to the jury to say whether the defendant's debt to the plaintiff was incurred by gambling or by borrowing; and the plaintiff had a verdict for 400*l.* *Platt*, in the same term, moved for a rule to show cause why a nonsuit should not be entered on the grounds above stated; or why a new trial should not be had, on affidavits alleging surprise, and

contradicting the evidence of a loan. Affidavits in answer, were filed for the plaintiff.

Thesiger and *Humfrey* now showed cause. *Green v. Davies* is distinguishable, because, there the instrument held to be a promissory note contained no agreement but to pay a sum of money with interest. Here it is added that a sum of money shall be placed to a particular account in the way of set-off. *Leeds v. Lancashire*, 2 Camp. 205, is an authority for the plaintiff; so also is *Bolton v. Dugdale*, 4 B. & Ad. 619, (24 E. C. L. R. 125,) a case much resembling the present. Here the document is (as the lord chief justice said in that case) "an agreement engrafted on a note." If the instrument in question be a promissory note, to whom and for what sum is it a note? It does not appear who would be entitled to demand the 95*l.*, or what claims of Reynolds, and against whom, the supposed note was intended to meet. The objection of variance, supposing it well founded, does not affect the second count. As to the suggestion that the instrument shows only a nudum pactum, it is not set up as containing the terms of an agreement: it is a bare acknowledgment, and equivalent to an I O U.

Platt and *Bull*, contra. First, this is a promissory note for the payment of a sum by instalments, the whole money to be paid being definite and certain, according to stat. 55 G. 3, c. 184, sched. part 1. tit. *Promissory Note*. The first part is, in form, a promise to pay the plaintiff, or order, 95*l.*; and supposing that the latter part is, as to 95*l.*, something different from a promissory note, that does not change the nature of the instrument as to the 600*l.* *Leeds v. Lancashire* is consistent with the defendant's view of this case. There the instrument was held not to be a promissory note, because, as between the parties to the action, the memorandum endorsed was necessarily incorporated with the whole matter on the face of the document. In *Bolton v. Dugdale*, 4 B. & Ad. 619, (24 E. C. L. R. 125;) S. C. 4 Nev. & M. 412, (a) the writing was a good agreement, and could not be a promissory note, for the sum payable was rendered uncertain by words necessarily affecting the whole. Here the instrument might have been negotiated as a note for 600*l.* The words added as to the 95*l.*, are not matter of agreement, for the plaintiff agrees to nothing; they merely state that that sum is carried to account in a particular manner. An instrument containing such a clause is not the less a promissory note: *Haussoullier v. Hartsinck*, 7 T. R. 733; *Dixon v. Nuttall*, 6 Car. & P. 320, (25 E. C. L. R. 418;) S. C. in banc, but this point not discussed, 1 Cro. M. & R. 307. Secondly, if this is an agreement, the consideration was material, for an agreement consists of consideration and promise; *Wain v. Warlters*, 5 East, 10; and here the written agreement is not that stated in the declaration, for the promise to pay is alleged to have been made in consideration of something which appeared on stating an account, whereas, nothing of the kind is found in the written instrument. [PATRICKSON, J. Might not the consideration be proved by parol?] No such evidence was given. And, lastly, the agreement, if any appears on this paper, is nudum pactum, no consideration appearing. It is indeed said, Com. Dig. *Agreement*, (B 2,) that, "where an agreement or contract is in writing, the consideration is not inquirable;" but that means where it is by deed or record. 7 T. R. 350, note (a), (*Rann v. Hughes*), is cited for this in 1 Com. Dig. 530, note (f), 5th (Hammond's) ed.

(a) See *Wise v. Charlton*, 4 A. & E. 786, (31 E. C. L. R. 180.)

The instrument in question, if considered as a promissory note unstamped, would clearly not be evidence, even on the general count: *Green v. Davies*: and an I O U does not prove the actual statement of an account; it is a mere admission of a debt, and was treated so in *Childers v. Boulnois*, Dowl. & R. N. P. C. (usually annexed as a supplement to 2 D. & R.) 8, (16 E. C. L. R. 411,) though it has been received as evidence on the count upon an account stated: *Payne v. Jenkins*, 4 Car. & P. 324, (19 E. C. L. R. 404.)

(The argument on the affidavits is omitted.)

LORD DENMAN, C. J. The first objection is, that this instrument was improperly received in evidence, being a promissory note not duly stamped. It is a note, up to a certain point, but it ends, "95*l.* to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. Davies to him." I think that takes from it the character of a promissory note, and makes it an agreement, and that it was properly received. Secondly, it is said that no consideration appears, to support the first count. But the promise itself imports a consideration, and he who says, "I promise to pay you 100*l.*," may, without any violent construction, be supposed to say, "we have settled accounts, and I am to pay you 100*l.*." Thirdly, it is objected that the instrument proved, merely showed nudum pactum; but the words "I agree to pay," are a perfect promise, and they import a consideration. It was not necessary that the document put in should be a complete agreement on the face of it, for it is only offered as evidence that such a transaction existed as the document refers to, and undoubtedly it is evidence of that. But the matter stated on affidavit, makes it fit that the case should receive further consideration. (a) The rule must therefore be absolute for a new trial; the rule for a nonsuit discharged.

LITLEDALE, J. This case is within the principle of *Leeds v. Lancashire*, 2 Camp. 205. To be a promissory note, the writing should be one entire instrument. Here the instrument, as to 95*l.*, is not a promissory note but an agreement; therefore the entire instrument is not a promissory note. As to the objection that no consideration appears on the document, that is true, but it supports the averment in the declaration, that the parties came to an account together (which is alleged according to the old mode of declaring upon an account stated); and there can be no doubt that they had come to an account, on which 69*l.* was to be paid to the plaintiff. The statement on the writing itself is evidence that there had been an account.

PATTESON, J. *Leeds v. Lancashire*, and *Bolton v. Dugdale*, 4 B. & Ad. 619, (24 E. C. L. R. 125) are not directly in point. In the first case the instrument was a complete note on the face of it, but qualified by the endorsement. The second was decided chiefly on the ground that the sum to be paid was uncertain, and therefore the instrument could not be a note. It is not necessary to determine whether there can be on the same paper a note and an agreement. Here the effect of the writing was, "I promise to pay 600*l.* by instalments, and I agree to set off 95*l.*." That was an agreement to pay 695*l.* in the whole, by the means stated. The 95*l.* was not to be paid to Davies, and could not be payable to his endorsee: the instrument, therefore, was not a promissory note.

COLERIDGE, J. We should be unwilling to require that two stamps

(a) The further observations on this part of the case are omitted.

should be affixed to one instrument, though, in a case like that suggested by my brother PATTESON, it might be necessary. But, if an instrument be in its nature entire, the stamp ought to be such as will apply to the whole; and if, as a whole, it cannot be a promissory note, the question must be, whether it is not good as an agreement. Here I think the document was so, not being one of those in which a statement of the consideration is requisite by the Statute of Frauds. It was, therefore, properly stamped.

Rule absolute for a new trial.

PHILLIPS against COLE.—p. 106.

Assumpsit by endorsee of a note against maker. Plea, that the note was made without consideration, and endorsed and delivered to W. for the purpose only of its being discounted; that W. in fraud of defendant, and without his consent, endorsed the same and delivered it to plaintiff, who gave no consideration, and knew of the want of authority. Replication, *de injuriâ*.

Held, that evidence of declarations made by W. was not admissible to prove the fraud; W. being alive and not called, and no proof having been previously given of any connection between W. and the plaintiff, or that the plaintiff took the bill under circumstances establishing a privity in point of law between him and W.

ASSUMPSIT on a promissory note made by defendant, payable to his order, and endorsed by him to one Alves, and by Alves to the plaintiff. Plea, that there was no consideration for defendant's making or endorsing the note; that he endorsed it in blank and delivered it to one Williams, for a special purpose only; viz. to get it discounted for defendant and pay him the proceeds, and Williams received it for that purpose, but did not get it discounted for defendant, and, while he had it for the purpose aforesaid, fraudulently and without defendant's knowledge or consent, and with intent to defraud him, procured the same to be endorsed with the name of Alves, (*a*) and then delivered the same, so endorsed, to plaintiff, who gave no consideration, and well knew that Williams had no authority to part with the same in manner aforesaid, and that there was no consideration for the making or endorsing as aforesaid; further averment, that Alves gave no consideration or value for his becoming party to the note, but the same was endorsed to him fraudulently and colourably; notice thereof to plaintiff. Verification. Replication, *de injuriâ*. Issue thereon.

On the trial before LITLEDALE, J., at the sittings in Middlesex, after Trinity term, 1837, it was proposed on behalf of the defendant to prove declarations of Alves in letters said to have been written by him while he was holder of the note. At the time of offering this evidence no proof had been given of any connection between Alves and the plaintiff, or of the plaintiff having taken the note when overdue, or without consideration. The evidence was objected to, on the authority of *Barough v. White*, 4 B. & C. 325, (10 E. C. L. R. 145) and rejected and the plaintiff had a verdict. In Michaelmas term, 1837, a rule nisi was obtained for a new trial, on account of the rejection of evidence. In this term (*b*)

Jervis and *Hoggins* showed cause. It is not easy to reconcile all the

(a) The fact appears to have been that Alves and Williams were the same person.

(b) May 2d. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Ja.

cases. *Barough v. White*, the only one solemnly decided, is a direct authority against the reception of this evidence. The established principle appears to be, that a party who has taken a note or bill before it became due, cannot be affected by declarations of a former holder, because he derives his title from the nature of the instrument itself, and not through such previous holder; but that if he has taken the instrument after it became due, he holds it subject to all previous infirmities, and the declarations of a party who held before him may be received against him, as showing that such party had a defective title. The decision at Nisi Prius, in *Smith v. De Wruitz*, Ry. & M. 212, (21 E. C. L. R. 419,) was consistent with this doctrine. In *Pocock v. Billing*, 2 Bing. 269, (9 E. C. L. R. 409,) it seems to have been allowed that declarations by a former holder may be received, if made while the instrument was in his possession, because they are then against his interest; but the grounds of decision are not clearly ascertainable from the report, and in *Barough v. White*, that case was not treated as a very binding authority. (*Jervis* here read the judgments of BAYLEY, LITTLEDALE, and ABBOTT, Js. in *Burough v. White*.) [COLERIDGE, J. PARK, J., observes on that case, in *Woolway v. Rowe*, 1 A. & E. 114, (28 E. C. L. R. 52,) (a) that "the then holder had" there "a better title than the party whose declarations were referred to," and that "the right of a person holding by a good title is not to be cut down by the acknowledgment of a former holder that he had no title."] *Peckham v. Potter*, 1 Car. & P. 232, (11 E. C. L. R. 377,) may be referred to on the other side; there the defendant, who was acceptor, was permitted to give in evidence declarations of the drawer; but that was to show a fraud in which the drawer and the plaintiff, who sued as endorsee, were joint conspirators: and in *Hedger v. Horton*, 3 Car. & P. 179, (14 E. C. L. R. 261,) where that circumstance did not appear, such evidence was rejected. The rule is, that to render declarations of living persons admissible, the person making them must be identified in interest with the party against whom they are to be proved; *Duckham v. Wallis*, 5 Esp. 251; *Beauchamp v. Parry*, 1 B. & Ad. 89, (20 E. C. L. R. 451;) *Welstead v. Levy*, 1 M. & Rob. 138. The case of *Clipsam v. O'Brien*, 1 Esp. 10, which is to a contrary effect, would have been differently decided at a later period. Here no evidence was given which could identify Alves with the plaintiff.

Humfrey, contra. The declarations were offered to show that the note was passed to the plaintiff not merely without consideration, but fraudulently. [COLERIDGE, J. You offer to show by the declarations that which is necessary to make the declarations evidence.] There is a difference between cases where the bill or note was merely obtained in the first instance without consideration, and cases where a suspicion arises that it was so obtained by fraud. In the former case actual proof of the absence of consideration between the original parties would not of itself oblige a subsequent holder to prove consideration; in the latter, he must prove it: *Mills v. Barber*, 1 M. & W. 425. In the present case, therefore, the object with which the evidence was offered is material. In *Barough v. White*, 4 B. & C. 325, (10 E. C. L. R. 345,) the evidence, if received, would only have shown want of consideration between the maker and payee of the note. In *Peckham v. Potter*, it was held that the drawer's acknowledgment of fraud might be given

in evidence by the acceptor against the endorsee, though Lord GIFFORD added, "the defendant must prove that the plaintiff is in some way privy to the fraud." So here, the evidence was admissible, though not of itself decisive. It would have been a material step in the proof. And the declarations of any person, while holder, are evidence if they impeach the security, because they are against the speaker's interest. [COLERIDGE, J. That would let in declarations showing want of consideration.] In *Shaw v. Broom*, 4 Dowl. & R. 730, (16 E. C. L. R. 220,) it was held, that in an action between endorsee and acceptor, declarations of the drawer, after parting with the bill (for value,) were not admissible to show want of consideration: but there it was evidently assumed that, if made while he held the bill, they would have been receivable. (a) The suggestion that the holder of a bill does not derive his title from the endorser, can only show, if entitled to weight, that, where a suspicion of fraud is raised, the case is taken out of ordinary rules; for it is now clearly settled that if the instrument be tainted with fraud, though in a prior holder, the plaintiff who sues upon it must prove consideration; *Mills v. Barber*, 1 M. & W. 425; S. C. 2 Gale's Exch. Rep. 5.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of the term, May 8th, delivered the judgment of the Court.

The question in this case arose upon the rejection of certain letters written by one *Alves*, a prior endorser of the note sued on, such letters being alleged to have been written by him while holder. (His lordship then stated the substance of the plea, set out p. 62, *antè*.)

It was argued that the letters were admissible on two grounds: first as declarations made not only against the interest, but in acknowledgment of the fraud of the party making them; and, secondly, as made by one under whom the plaintiff, being a subsequent holder, claimed.

With regard to the first of these, it is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, merely because they are against the interest of those who make them. The general rule of law, that the living witness is to be examined on oath, is not subject to any exception so wide; and we are of opinion that the circumstance of fraud being acknowledged introduces no difference in principle; that acknowledgment would certainly make the evidence, if receivable, more weighty, but only upon the ground that it is more strongly against the interest of the party than any merely pecuniary consideration could make it. The ground of its admission would be the same in either case; and the same objection applies in both, the want of community of interest.

The second ground, if it could have been established in fact, would have made the letters admissible; but when they were tendered, no evidence had been offered, which either directly or indirectly connected the plaintiff with *Alves*. On the evidence the plaintiff did not claim

(a) In answer to a question from Coleridge, J., whether, in that case, any privity was established between the plaintiff and the former holder, Humfrey read the report, by which it appears that the bill was not due when endorsed to the plaintiff; and that after the evidence in question had been admitted, the former holder was called, and stated that no consideration passed between himself and either the plaintiff or the defendant. In *Benson v. Marshal*, there cited, (p. 731,) where the declaration of a former holder was admitted, the bill was over-due when endorsed to the plaintiff.

under Alves; he had a title of his own as endorsee, and might have an indefeasably good title, though Alves had none at all. Nothing like want of consideration, or the having taken the note over-due, was shown. Under these circumstances we hardly want an authority for holding that the plaintiff's title is not to be affected by the declarations of Alves, who might have been called; but *Burrough v. White*, and *Beauchamp v. Parry*, are, among others, in point.

It was said that the letters themselves would have disclosed fraud, and brought the plaintiff into privity with the writer; but whatever is a preliminary necessary to the admissibility of evidence must be proved aliunde before such evidence is admitted.

The letters were therefore rightly rejected, and the rule for a new trial must be discharged.

Rule discharged.

PHELPS and Others against LYLE.—p. 113.

The directors of a private company, formed under a deed of settlement, sued upon a contract made with themselves as directors. On the trial it appeared that there was another director not named as plaintiff, who had become bankrupt, and had ceased and declined to act, or attend the board of directors, when the contract was made.

Held, (on non assumpsit,) that the plaintiffs ought to have produced the deed to show that they had authority, in the character of directors, to sue for the company; and also to show that the office of director was determined by bankruptcy, or by voluntarily ceasing to act.

ASSUMPSIT by four persons on a bargain and sale of a steam-engine to defendant. Averment, that plaintiffs were ready and willing to deliver, but defendant refused to accept it. Pleas, 1. Non assumpsit. 2. Denial of the bargain and sale. 3. Denial that plaintiff was ready and willing, &c. 4. That defendant did not refuse to accept, but that plaintiffs refused to deliver, or to permit defendant to take it away: verification. Replication to the last plea, *de injuria*, generally.

On the trial before Lord DENMAN, C. J., at the sittings in London after Trinity term, 1837, it appeared that the plaintiffs were directors of a joint stock company, called the London United Mine Company, consisting of several shareholders besides the plaintiffs, and formed under a deed of settlement, which was not produced. It was shown that a person named Chance, not joined as co-plaintiff, had been a director seven years before the contract declared on and action brought; that he then became bankrupt, and had ever since declined and ceased to act or attend boards as a director, but was still alive, and held shares. Two other directors were dead. The entire number had been seven. A correspondence between defendant and the secretary of the company was put in, to prove a contract with the directors, in which the secretary sometimes spoke in the name of the directors, and sometimes of the company generally. On the defendant's part it was objected that the letters showed no binding contract, but only proposals and negotiation; that the Statute of Frauds was not satisfied; that the contract, if any, was with the company, and, consequently, that all the shareholders should be joined as plaintiffs; that if the contract was with the directors, Chance should have been joined as plaintiff, or his non-joinder accounted for; and that the deed of settlement ought to have been produced.

The jury found a verdict for the plaintiff, leave being reserved to move to enter a nonsuit on the above points.

In Michaelmas term following, a rule nisi was obtained accordingly, upon the effect of the correspondence, and on the ground that the plaintiffs were not the proper parties to sue.

Sir *F. Pollock* and *Swann* now showed cause. Whether the plaintiffs are the proper parties to sue depends on the question of fact, with whom the defendant contracted? Chance never acted as director at the time of the contract; it is impossible, therefore, to suppose that any contract was made with him. If there was a doubt, it ought to have been left to the jury to say whether Chance was or was not a director at the time of the correspondence. If the assignees of a bankrupt contract through their solicitor during the absence of one of them, who has never acted, and has been many years abroad, it is clear that they, and not the absent person, who was no party to the contract, should sue and be sued on it. Those who contract with a fluctuating body, and in general terms, must be taken to be dealing with the persons who actually constitute the body, and have not voluntarily receded from it: *Metcalf v. Bruin*, 12 East, 400. It is said the deed of settlement should be produced; but the cause of action is independent of it. It is enough to show that the bargain was made with the then directors, and that the plaintiffs were then acting as such. If the action were on an implied contract, it might be otherwise. [The argument on the other points is omitted.]

Sir *J. Campbell*, Attorney-General, and *Butt*, contra. If the contract was with the directors, they should have all joined in the action, for the action must be by the parties actually contracting, or those really interested. *Skinner v. Stocks*, 4 B. & Ald. 437, (6 E. C. L. R. 478.) It was not proved that Chance had ceased to be a director: mere bankruptcy and non-attendance would not discharge him, unless there was a provision to that effect in the deed, which was not produced. Bankruptcy would only divest him of a beneficial interest; and absence from the board only proves a neglect of duty. The contract was not between defendant and certain named persons, A, B, C, in which case they alone might have sued, but between him and the "directors" generally, whom the secretary represented. It is said the evidence should have been left to the jury; but this was not requested on the trial, where the question was treated by both sides as matter of law. Then, if there was any special provision authorizing the directors to contract and sue in trust for the company, the deed of settlement should have been produced. *Dickinson v. Valpy*, 10 B. & C. 128, (21 E. C. L. R. 41,) and *Bramah v. Roberts*, 3 New Ca. 963, (32 E. C. L. R. 404,) show that special powers must be proved by the original deed from which they are derived.

Lord DENMAN, C. J. This is an action by four of the directors of a private company for not accepting goods sold by them to the defendant. The correspondence adduced in evidence tends rather to prove a contract with the company than with the directors, but this is a point which we need not consider. It is clear that the plaintiffs, whose right of action, if any, depends on the fact of their being the directors, must prove themselves to be such; and if a party who was a director, has been omitted, the plaintiffs must show that his character of director has been legally determined. For this purpose they ought to have produced the deed.

LITLEDAL, J. The company may authorize certain persons to act for them, and to sue alone upon contracts expressly entered into with them. Such persons would be called directors. Are the plaintiffs such directors, and have they the power to sue on behalf of the company? This cannot be satisfactorily shown without producing the deed. As to Chance, he appears to be still interested as a shareholder; neither his bankruptcy nor his non-attendance necessarily put an end to his character of director, unless it be so provided by the settlement deed, which was not in evidence.

PATTESON, J. I give no opinion on the question, whether the contract here was with the directors or the company, but assume that it was with the former. Of these there were seven. Two are dead. Another is still living. It lies on the plaintiffs to prove that he has ceased to be a director, and by what circumstances. Absenting himself from the board does not, in point of law, make him cease to be one. His omission to do duty is no proof that he has none to perform.

COLERIDGE, J. The directors are not those only who happen to attend a board, or to meet on a particular day, but those who are directors by the provisions of the deed of settlement. The plaintiffs, therefore, ought to have shown themselves to be the proper parties to sue by producing it.

Rule absolute for entering a nonsuit.

DE GONDOUIN against LEWIS and Another.—p. 117.

In trespass for taking a portfolio and drawings, the defendant, an officer of the customs, may justify the seizure by showing that the portfolio contained drawings liable to seizure for non-payment of duty, which the plaintiff was in the act of carrying ashore out of a foreign packet; though the seizure was in fact made not as on a forfeiture, but for the purpose of examination; and though the articles seized were in fact returned after being examined; and no demand of them had been made before the seizure.

Seemable, that if the plaintiff had sued for the assault, the defendant could not have justified without showing either a previous demand or some circumstance to warrant the use of force in the first instance.

Notice of action (under stat. 3 & 4 W. 4, c. 53, s. 103,) by an infant to an officer of the customs, may be given by his *procchein amy*, although he may not be the *procchein amy* on the record.

TRESPASS by an infant (who sued by G. Humbert as *procchein amy*) for taking and detaining a portfolio and drawings. Plea, Not guilty.

On the trial before Lord DENMAN, C. J., at the Lewes summer assizes, 1837, it appeared that the plaintiff was a French boy who had arrived at Brighton by a packet, at a late hour of the evening in the month of September. The defendants, who were officers of the customs, required that all luggage, except night-things, should be left on board for examination on the following morning. The plaintiff was in the act of passing from the boat to the pier by a plank or platform with a portfolio containing some drawings, when defendants forcibly took it from him. It was not proved that defendants had first asked him to deliver it up. Early on the following morning it was examined and returned to plaintiff by one of the defendants, who said "it was all right." The notice of action was in the following form, "To Mr. Comptroller Lewis," &c.—"You having wrongfully seized and taken from the person of Adolphe de Gondouin, of," &c., "his portfolio. containing draw-

ings, the performance of his own hand, and not contraband or seizable," &c., "I do therefore give you and each of you notice that I shall, at or after the expiration of one calendar month from the service of this notice, cause a writ of summons to be sued out of the court of King's Bench against you, and each of you, at the suit of the said A. de Gondouin for the said trespasses, and proceed thereupon." Dated, &c. Signed, "Yours, &c., Augustus Pitcher, No. 88," &c., "acting on behalf and as the prochein friend of the said A. de Gondouin, an infant of the age of ten years." Pitcher, who signed the notice, was the attorney whose name was endorsed on the writ as attorney of the prochein amy on the record.

At the trial it was objected, 1. That the notice was insufficient; but the objection was overruled, with leave to mention it to the Court above, if necessary: 2. That the defendants had a right to detain the goods for examination at a convenient time; 3 & 4 W. 4, c. 52, ss. 2. 14. 56. & 57; and that, as the goods were admitted to be drawings, which are liable to a duty by 3 & 4 W. 4, c. 56, and were illegally unshipped, they were forfeited, and might be seized accordingly; 3 & 4 W. 4, c. 53, ss. 15. 28. 32. The lord chief justice was of opinion, that a defence was made out, but directed the jury to find such damages as they thought fit, on the supposition of the seizure being illegal. The jury found one farthing damages; whereupon the plaintiff was nonsuited, with liberty to move to enter a verdict for that amount. *Wallinger*, in the following term, obtained a rule nisi accordingly.

Sir *J. Campbell*, Attorney-General, and *Spankie*, Serjt., now showed cause. The notice was insufficient. Stat. 3 & 4 W. 4, c. 53, s. 103, requires notice of action "by the attorney or agent of the party." Pitcher was prochein amy, and not attorney of the plaintiff; and though it will be said that an infant cannot appoint an attorney, yet his prochein amy can. Independently of the notice, the drawings had been actually taken out of the boat without paying or securing the duty; this occasions a forfeiture of the drawings and of the portfolio containing them, by 3 & 4 W. 4, c. 53, s. 28. Then, all goods liable to forfeiture may be seized in any place by an officer of the customs, by sect. 22 of the same act.

Wallinger, contra, was stopped, upon the point of notice. The Court expressing a clear opinion that a prochein amy was a sufficient attorney, or at all events, an "agent" for the purpose of giving the notice. As to the merits, the drawings may possibly have been articles exempted from duty; at all events they were not taken as forfeited. The return of them to the plaintiff shows there was no intention to seize on that ground. If the plea had been special, the plaintiff might have newly assigned that they were seized for another and different purpose, and not as forfeited. Even if forfeited, they ought to have been demanded before seizure. It is questionable whether the defendants ought to have forcibly taken them from the person at all: a seizure under such circumstances is against common right, as appears by the rule against taking, under a distress or execution, an article in use, or on the person: *Storey v. Robinson*, 6 T. R. 138; *Sunbolf v. Alford*. 3 M. & W. 248. It is a breach of the peace. [Lord DENMAN, C. J. That is not your complaint here. COLERIDGE, J. If personal custody is to protect forfeited goods, the revenue laws cannot be enforced. If there was personal violence, the plaintiff has not brought his action for

it; and, as for the goods, they, being forfeited, were no longer his.] It was not shown upon the trial that the goods were actually forfeited. [PATTESON, J. Sect. 32, authorizes seizure of goods "liable to forfeiture."]

LORD DENMAN, C. J. If the plaintiff had sued in trespass for an assault, the evidence would not have amounted to a justification; for I do not think an officer can forcibly take goods from the person without a previous demand, unless, indeed, there be fraud, or something to justify the use of force in the first instance. But here the action is in respect of the goods, which were undoubtedly liable to seizure. *Storey v. Robinson* was an action for an assault, and is, therefore, inapplicable.

LITTTLEDALE, J. The goods were actually unshipped, and being liable to a duty, and, therefore, to forfeiture for non-payment of it, were justly seized by the defendants.

PATTESON, J. If a demand had been required as a condition precedent to seizure, the defendants could not have justified; but there is no such requisition. The goods, therefore, were liable to seizure; and as for any unlawful violence in the act of taking, the plaintiff has not made that the subject of his action.

COLERIDGE, J., concurred.

Rule discharged.

DOWN against HATCHER and CHARLOTTE, his Wife, Executrix of ROGERS.—p. 121.

In *indebitatus assumpsit* for various debts, amounting in the whole to 500*l.*, the declaration admitted payment of 158*l.* on account, and alleged that the residue remained unpaid, to plaintiff's damage of 200*l.* Plea, as to the said residue, that defendant paid, and plaintiff accepted, 6*l.* 10*s.* in full satisfaction thereof, and of all causes of action in respect thereof. The replication denied the payment in satisfaction, and, upon issue joined, the jury found for defendant. Held, that the plea, alleging the acceptance of a less in satisfaction of a larger sum, was bad after verdict; and that plaintiff was entitled to judgment *non obstante veredicto*.

INDEBITATUS *assumpsit* for 300*l.* for the use and occupation of a dairy farm by Rogers, the testator. 2*d* count, for 100*l.* for agistment of testator's cattle. 3*d* count, for 100*l.* for money due on an account stated between plaintiff and testator. Breach, that although the plaintiff had received 158*l.* 5*s.* 8*d.* on account of the said several sums, "yet the residue thereof, to wit, the sum of 500*l.*, remained unpaid," &c., to the plaintiff's damage of 200*l.* Plea, as to the said residue of the said sums, that after the promise and before action, defendant Charlotte, as such executrix, paid plaintiff 6*l.* 10*s.* in full satisfaction and discharge of the said residue, and of all causes of action in respect thereof; and that plaintiff accepted and received the said 6*l.* 10*s.* in such full satisfaction and discharge as aforesaid. Verification. Replication, that defendant Charlotte, as such executrix, did not pay plaintiff the said sum, *modo et formâ*. Conclusion to the country. The particular of demand was for 240*l.* for the rent of a dairy of twenty-four cows, and gave credit for 158*l.* 5*s.* 8*d.*, leaving the difference (81*l.* 14*s.* 4*d.*) as the sum sought to be recovered. At the trial before PATTESON, J., at the summer assizes at Bridgewater, 1837, the defendants obtained a verdict. In the following term, *Barstow* obtained a rule nisi for judgment *non*

obstante veredicto, or for a new trial on the ground of a perverse verdict.

Rogers and Fitzherbert now showed cause. (a) The question is, whether this plea of payment is bad after verdict. The damages sought to be recovered by the declaration are limited to 200*l.*; and the sum of 6*l.* 10*s.* is pleaded as accepted in satisfaction. This would perhaps be bad on demurrer, on the ground that a less sum can be no satisfaction of a greater; *Cumber v. Wane*, 1 Stra. 426; *Fitch v. Sutton*, 5 East, 230; *Thomas v. Heathorn*, 2 B. & C. 477, (9 E. C. L. R. 152.) *Smith's Leading Cases*, vol. i. p. 147, note to *Cumber v. Wane*, was also cited; but if there be any circumstances under which a less sum may be a legal satisfaction of a greater, the Court will presume after verdict that such was the case here. *Wilkinson v. Byers*, 1 A. & E. 106, (28 E. C. L. R. 48,) (b) shows that payment of the same, or a less sum than the sum demanded, may be a good consideration for a promise to stay proceedings; as where the debt is unliquidated, and the Court would interfere to stay an action continued after such payment, and acceptance. If so, it seems to follow that such payment, if pleaded, would be an answer to the action. *PARKE, J.*, there says, expressly, that payment of a less sum than the demand is a satisfaction, where the debt is unliquidated. Here the action is for unliquidated damages; and although the plaintiff necessarily specifies the sum at which he estimates his damage, that amount is not material. In *Jourdain v. Johnson*, 2 C. M. & R. 564, a plea of payment into Court of a less sum seems not to have been considered bad by the Court on that ground, but because it treated several counts as one. A distinction is there made between debt and assumpsit. *Wright v. Acres*, 6 A. & E. 726, (33 E. C. L. R. 197,) is strongly in favour of the plea. There a plea of payment of 10*l.* in satisfaction of the promises and damages, pleaded to a declaration of indebitatus assumpsit, containing two counts for 10*l.* each, and laying the damages at 20*l.*, was held good after verdict; and though it is true that a *nolle prosequi* as to one count had narrowed the issue, yet it does not appear that the decision of the Court depended altogether upon that fact. (c) *Mee v. Tomlinson*, 4 A. & E. 262, (31 E. C. L. R. 66,) was decided on special demurrer.

Barstow, *contra*. Though there may be no case in which a similar plea has been decided to be bad after verdict, yet, as this is admitted to be bad on general demurrer, and there is nothing in the verdict that can cure the defect, it must be taken to be still bad. *Thomas v. Heathorn*, 2 B. & C. 477, (9 E. C. L. R. 152,) shows that the plea is bad in substance, and that if such a transaction can constitute a defence, it should be pleaded according to its legal effect, *viz.* as a payment of the whole, and a return of part by way of a gift. It is true that an agreement to accept part, founded on a sufficient consideration, may be a defence; but the agreement must be pleaded, and cannot be left to presumption or conjecture even after verdict. *Serjt. Williams*, in note (1) to *Stennel v. Hogg*, 1 Wms. Saund. 228, lays down the rule, that where the issue joined necessarily required, at the trial, proof of the facts defectively stated or omitted, there the defect or omission is cured by verdict. But

(a) Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(b) And see *Reynolds v. Pinhowe*, Cro. Eliz. 429, there cited.

(c) A report of the same case was read from Will Woll. and Dav. 328, which was more favourable to the defendants.

here the only question in issue was, whether 6*l.* 10*s.* was accepted in satisfaction of the residue, which may be quite true, and yet no answer. It is impossible to presume that the jury found payment of enough to cover all the residue mentioned in the declaration; for that was never in issue. [He then offered to take a verdict with nominal damages, if the defendants would consent; upon which the Court suspended their judgment.]

LORD DENMAN, C. J., on a subsequent day of the term, (Wednesday, May 8th,) delivered the judgment of the Court, that the plea was bad after verdict, and that there must be judgment *non obstante veredicto*.

Rule absolute for judgment *non obstante veredicto*.

STRANGE and Others against PRICE.—p. 125.

“Messrs. S. and Co. inform Mr. P. that Mr. B.’s acceptance, 87*l.* 5*s.*, is not paid. As endorser, Mr. P. is called upon to pay the money, which will be expected immediately. December, 1836.”

Held, not sufficient notice to P. of dishonour of a bill accepted by B., payable December 24th.

ASSUMPSIT by endorsee against endorser of a bill of exchange, drawn 21st October, 1836, payable two months after date, accepted by John Betterton. Pleas, denying, 1, the acceptance; 2, the notice of dishonour. Issue thereon. On the trial before PATTESON, J., at the Salisbury summer assizes, 1837, it was proved that the following letter was sent by plaintiffs to defendant on December 29th, 1836.

“Messrs. Strange and Co. inform Mr. James Price that Mr. John Betterton’s acceptance, 87*l.* 5*s.* is not paid. As endorser, Mr. Price is called upon to pay the money, which will be expected immediately.

“Mr. James Price, Fairford.

“Swindon, December, 1836.”

A verdict was found for the plaintiffs, with leave to move to enter a nonsuit if the Court should consider the notice insufficient. *Erle*, in the ensuing term, obtained a rule accordingly.

Crowder and *Butt* now showed cause. The letter was a sufficient notice. ABBOTT, C. J., says, in *Hartley v. Case*, 4 B. & C. 339, (10 E. C. L. R. 350,) “There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice; it does not even say that the bill was ever accepted.” In *Tindal v. Brown*, 1 T. R. 167; ASHHURST, J., said, “Notice means something more than *knowledge*; because, it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to *pay*, but that he (the holder) *does not intend to give credit*. In the present case, there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the endorser.” *Hartley v. Case* introduced a greater precision than was before thought requisite, but the present notice meets every test furnished by either of these cases. The defendant is told that the plaintiffs look to him as endorser, by reason of Betterton’s acceptance not being paid. *Solarte v. Palmer*, 1 New Ca. 194, (27 E. C. L.

R. 351;) S. C. 8 Bligh, N. S. 874; S. C. in Exch. Chamb. 7 Bing. 530, seems to lay down a rule of increased strictness: but the terms in which that case was decided have been the subject of much discussion since; and the decision, at all events, is not unfavourable to the present plaintiffs, for there the notice did not even show that the bill had been accepted. It is true, that, in *Boulton v. Welsh*, 3 New Ca. 688, (32 E. C. L. R. 283,) TINDAL, C. J., said, "The rule requires that, either expressly, or by necessary inference, the notice shall disclose that the bill or note has been dishonoured." "The two important facts are, that payment of the bill has been demanded of the acceptor, and that payment has not been obtained. In like manner, in the case of a promissory note, the notice should show a presentment to the maker, a demand of payment and refusal. Here, the notice only states that the note became due and was returned unpaid. These facts are compatible with an entire omission to present the note to the maker." But the rule of "necessary inference" was applied too strictly in that case, according to the judgment of the Court of Exchequer, in *Hedger v. Steavenson*, 2 M. & W. 799, which agrees with the decision of this Court, in *Grugeon v. Smith*, 6 A. & E. 499, (33 E. C. L. R. 128.) The last three cases were under the consideration of the Court of Common Pleas in *Houlditch v. Cauty*, 4 New Ca. 411, (33 E. C. L. R. 394;) but the circumstances there rendered it unnecessary for the Court either to reverse or to affirm its former decision. PARKE, B., says, in *Hedger v. Steavenson*, 2 M. & W. 805, "It seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him." If that be so, the notice here is clearly sufficient. The word "returned," has been relied upon as having a peculiar mercantile signification, but there is no ground for such an assertion. A particular expression is not essential any words which convey a distinct idea of the fact are sufficient. [LITLEDAL, J. The word "returned" would not be proper in many cases; for instance, if the party presented the bill himself. COLERIDGE, J. The parties very often are not mercantile men; if their understanding is to be a test in any instance, there will be different rules for different cases.] Here any person would understand that the defendant was looked to as endorser, in consequence of the bill not being paid at maturity. The notice is very different from those in *Hartley v. Case*, and *Solarte v. Palmer*, which did not even show that the bill had been accepted. [PATTESON, J. That was not the material point; the ground of decision was, that the bill did not appear by the notice to have been dishonoured. In the present case, the notice does not show, by date or otherwise, that the bill is overdue.] That has never been held essential. The fact, that the bill was overdue when the notice was given, would be matter of evidence at the trial. It must be inferred from the notice that the bill had been presented, and it would not have been presented unless due.

Erle, contra. This notice is bad, as not showing that payment has been demanded and refused. A plaintiff might give such a notice though he had always kept the bill in his own pocket. ABBOTT, C. J., in *Hartley v. Case*, insists on the necessity of showing, by the notice, that payment has been refused by the acceptor. The holder must not merely say to his endorser, "I look to you, as endorser, for payment;" he must assert the dishonour of the bill by the primary party. The

decision in *Solarte v. Palmer* was the confirmation, by two successive Courts of Error, of the principle laid down in *Hartley v. Case*. Here the dishonour of the bill does not appear on the notice, either (as TINDAL, C. J., said in *Solarte v. Palmer*, 7 Bing. 533, (20 E. C. L. R. 226,)) "in express terms or by necessary implication." The principle of the two last-cited cases, gave the ground of decision in *Boulton v. Welsh*. The word "returned" was insisted upon there, but without success, as a word of known mercantile signification, and affording a "necessary inference" that the note had been presented and dishonoured. *Hedger v. Steavenson*; *Grugeon v. Smith*; and *Houlditch v. Cauty*, where it was held that sufficient notice had been given, were all different cases from this: in the first two, the notices showed that the note and bill had been noted for non-payment; in the third there was an acknowledgment by the defendant: and the notices in all contained the word "returned," which, as PARKE, B., observed in *Hedger v. Steavenson*, "is almost a technical term in matters of this nature, and means that the bill has come to maturity, has been presented, and has not been paid." It is not necessary to contend that this word is essential in every notice; but some generally known term on such subjects ought to be used; as the word "dishonoured;" *Woodthorpe v. Lawes*, 2 M. & W. 109.

LORD DENMAN, C. J. I have some doubt as to the reasoning on which the decisions in *Hartley v. Case*, 4 B. & C. 339, (10 E. C. L. R. 350,) and in *Solarte v. Palmer*, 1 New Ca. 194, (27 E. C. L. R. 351;) S. C. 8 Bligh, N. S. 874; S. C. in Exch. Chamb., 7 Bing. 350, (20 E. C. L. R. 226,) have turned; but the decision in the latter case (as was observed in the Court of Exchequer)(a) is binding, and I think it authorizes our saying here that the notice is not sufficient. As in *Solarte v. Palmer*, so here, the notice does not convey full information that the bill has been dishonoured. In all the cases where such notices have been held defective, it might have been said that they furnished a reasonable implication of the fact: but clearly that is not sufficient: the notice must be a positive statement that the bill has been accepted and dishonoured. In cases where the strict rule has been thought not applicable, there have been circumstances connected with the notice which showed that the necessary implication did arise.

LITTLEDALE, J. To persons in general, perhaps, a notice like this would convey the requisite information; but, if we are to lay down a rule on the subject, we must say that such a notice is insufficient. It is not said that the bill has been dishonoured, or returned; consistently with the language used, it might never have been presented, and have remained unpaid by reason of the holder's laches.

PATTESON, J. I thought this case might by possibility be distinguished from *Solarte v. Palmer*, and was anxious that it should be discussed; but no real distinction can be drawn. It is argued that the acceptor's default may be inferred from the defendant being called upon as endorser; but that was suggested also in *Solarte v. Palmer*. Here as in that case, the notice does not furnish the date of the bill, or the time of its becoming due. I do not say that that is essential; but the notice is at all events open to the objection which prevailed in *Solarte v. Palmer*, that the fact of dishonour is not fully shown, and we are bound by that decision.

(a) See *Hedger v. Steavenson*, 2 M. & W. 805.

COLERIDGE, J. I also think that we are bound by *Solarte v. Palmer*. The cases referred to, in which the notices have been held good, were distinguishable from that, by the word "returned" or "dishonoured," or by a reference to notarial charges. The case in favour of the notice is less strong where only one of these circumstances occurs; but, in all the instances, one at least has been found.

Rule absolute (a)

(a) The following case was decided in Trinity term, 1840.

COOK against FRENCH.—p. 131.

"D.'s acceptance for 200*l.*, drawn and endorsed by you, due 31st July, has been presented for payment and returned, and now remains unpaid," is a sufficient notice of dishonour

THIS was an action by endorsee against drawer of a bill of exchange; plea, no notice of dishonour. On the trial before WILLIAMS, J., at the sittings in Middlesex, in Trinity term, 1840, the following notice was proved. "I beg to inform you, that Mr. Duterrau's acceptance for 200*l.* drawn and endorsed by you, due 31st July, has been presented for payment and returned, and now remains unpaid." The jury, under the learned judge's direction, found a verdict for the plaintiff. *Selfe*, in the same term, (May 4th,) moved (before Lord DENMAN, C. J., LITTLLEDALE, PATTESON, and COLERIDGE, J.,) for a new trial on the ground of misdirection, contending that the notice was bad, because it did not apprise the defendant that he would be held liable. He cited *Burgh v. Legge*, 5 M. & W. 418.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of the term, (May 6th,) said the Court were of opinion that the notice of dishonour was good.

Rule refused.

The QUEEN v. The Poor Law Commissioners.—p. 131.

In the Matter of The CAMBRIDGE Union.

THIS case is reported, 9 A. & E. page 103.

The QUEEN v. CROSSLEY and ROBINSON.—p. 132.

An indictment against overseers on sect. 47 of stat. 4 & 5 W. 4, c. 76, for not accounting to the auditor of a union, upon request, on a day appointed by him, is bad, unless it appear that there was some rule, order, or regulation of the commissioners that the overseers should account upon such request.

Where no such order, &c., is alleged, the indictment cannot be sustained after verdict, merely because it appears, by inference, or the inducement, that defendants have not in fact accounted for one whole quarter.

Upon such indictment it is sufficient, at least after verdict, to allege the order to have been made by "the Poor Law Commissioners for England and Wales," without naming each commissioner; and to state that a copy of the order under seal, &c., was "duly sent" to the overseers, without alleging actual service of it on them. *Per Lord Denman, C. J., and Patteson, J.*

Quære, Whether disobedience of an order of the commissioners to account be indictable under sect. 98 before the third offence?

INDICTMENT (7th January, 1838), on stat. 4 & 5 W. 4, c. 76, s. 47, against overseers for not accounting. The first count recited an order of "the Poor Law Commissioners for England and Wales" forming the township of Todmorden and Walsden, and other districts, into a union; and that a union and board of guardians were duly formed accordingly. It further stated another order by the same commissioners, that the guardians should appoint an auditor of the union; and that such auditor

should, four times in every year, that is to say, within thirty days of each of the following days, viz. Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, audit the accounts of the several parishes, &c., comprised in the union, "according to the laws in force for the time being for the administration of the relief of the poor;" that a copy of the last-mentioned order, under seal, &c., was "duly sent" by the said commissioners to the overseers of each parish, &c., according to the provisions of the act; that defendants were overseers of the said township of T. and W., and that the guardians of the union had duly appointed J. Gledhill to be auditor, whereof defendants had notice; that it was the duty of defendants, as such overseers, under and by virtue of the provisions of the act, to make and render an account to the said J. G., as such auditor, when and as often as, the rules, orders, and regulations of the commissioners did direct: that afterwards, on a day within thirty days of Christmas-day, 1838, viz. on, &c., defendants, as such overseers, were required by J. G., as such auditor, to render to him an account at a certain day within such thirty days, to wit, on, &c., in pursuance of the said act; but that defendants, not regarding, &c., did not render such account at the said time at which they were so required.—The 2d and 3d counts were substantially the same.—The 4th count stated that defendants were overseers of the above township; that J. G. was auditor of accounts in a union in which the said township was comprised; that defendants were required by J. G. to render an account to him on a certain day, viz. on 2d January, 1838; that defendants had not, at the time of the inquisition, rendered an account to J. G. for the then current quarter, and that it was their duty to render such account to him; but that defendants did not render an account to him at the time when they were so required, and "from thence continually hitherto" have neglected to render an account, &c. The 5th count was similar to the 4th.—The 6th count stated that for more than six calendar months before committing the offence thereafter mentioned, and thence continually until the committing, &c., J. G. was auditor in a certain union in which the above township was comprised; that for more than a quarter of a year preceding that time defendants were overseers thereof, and continued so till the committing, &c.; that it was their duty, as such, to render an account to J. G., as such auditor, once at least in every quarter of a year while they continued overseers; that J. G., on, &c., required defendants to render such account on a certain day then to come, to wit, on, &c.; that defendants had not, at the time of such request, rendered any account to him for the then current quarter, and did not render one to him on the day required, and have thence continually refused to render, &c.

On the trial before ALDERSON, B., at the last Liverpool Spring assizes, a verdict was found for the Crown, subject to a motion to enter a verdict for defendants on the ground that the auditor was not legally appointed

In this term (18th April,) *Dundas* moved to enter a verdict for defendants on the above ground, and also to arrest judgment on the following grounds: 1. That no indictment would lie, because the act provides a specific penalty in sect. 95, and the offence was not punishable before; *Rex v. Robinson*, 2 Burr. 799. The auditor being a servant of the guardians, the disobedience was of *their* order. 2. That, if indictable, the offence was not properly charged; for that the names of the commissioners should have been stated. That, although sect. 2

gives them an official style, and sect. 3 enables them to use a seal, this does not make them a corporation, nor dispense with the necessity of naming them in an indictment; *Rex v. Sherrington*, 1 Leach, C. C. 513. There a statute expressly provided that property might, in an indictment, be laid in "the trustees of the poor of," &c., yet it was held necessary to add their names, because they were not incorporated. (a) 3. That a copy of the order for the appointment of the auditor was not alleged to have been personally served on each defendant, which was necessary to bring them into contempt; *Rex v. Kingston*, 8 East, 41. The Court granted a rule to show cause when judgment should be moved for.

Starkie and *Peel* now showed cause on moving for judgment. (b)—As to the objections in arrest of judgment: (c) it is said that no indictment lies, because sect. 95 imposes a penalty on overseers for wilfully disobeying the legal and reasonable orders of guardians in carrying the orders of the commissioners into execution. But this is not an offence under that section, nor under sect. 98. The defendants are not charged with disobeying the guardians or commissioners, but the peremptory directions of the legislature contained in sect. 47. It is a disobedience of the law, for which the defendants are liable, although pecuniary penalties may be superadded by another and distinct provision of the same act. *Rex v. Robinson*, 2 Burr. 799, (d) is an authority for this. *Reg. v. Wyatt*, 1 Salk. 380, shows that neglect of duty by a public officer is indictable *per se* at common law, independently of any order or request. The order here only fixes the time. [Lord DENMAN, C. J.—The request is to account on a certain day. The defendants may have done so on the very next day, and yet within the thirty days. PATTESON, J.—You do not allege any order of the commissioners to the overseers, requiring them to account to the auditor, nor do you allege it to be a rule of the commissioners that all overseers shall render an account to him at his request.] The last three counts distinctly show a neglect to account for one quarter, which defendants were, at all events, bound to do. The fourth count states a neglect on the 2d of January, 1838, and thence till

(a) See *Rex v. Beacall*, Moody's C. C. 15.

(b) Stat. 4 & 5 W. 4, c. 76, s. 47, upon which the indictment was framed, enacts, "That every overseer, treasurer, or other person having the collection, receipt, or distribution of the moneys assessed for the relief of the poor in any parish or union, or holding, or accountable for, any balance or sum of money, or any books, deeds, papers, goods, or chattels relating to the relief of the poor, or the collection or distribution of the poor rate of any parish or union, shall once in every quarter, in addition to the annual account now by law required, and where the rules, orders, and regulations of the said commissioners shall have come in force, then as often as the said rules, orders, and regulations shall direct, but not less than once in every quarter, make and render to the guardians, auditors, or such other persons as by virtue of any statute or custom, or of the said rules, orders, or regulations, may be appointed to examine, audit, allow, or disallow such accounts, or, in default of any such guardian, auditor, or other person being so appointed as aforesaid, then to the justices of the peace at their petty sessions for the division in which such parish or union shall be situate, a full and distinct account in writing of all moneys, matters, and things committed to their charge, or received, held, or expended by them on behalf of any such parish or union, and, if thereunto required by the justices, guardians, auditors, or other persons authorized in that behalf, shall verify on oath the truth of all such accounts and statements from time to time respectively, or subscribe a declaration to the truth thereof, in manner and under the penalties in this act provided for parties giving false evidence or refusing to give evidence under the provisions of this act;" &c.

(c) The argument on the legality of the appointment of auditor is omitted, the Court having given no opinion on that point.

(d) See also *R. v. Harris* 4 T. R. 205; and n. (4) to *R. v. Dickenson*, 1 Will. Saund. 135 a.

the time of the inquisition, which exceeds a quarter; so that the caption of the indictment shows a breach of duty. [LITTLEDALE, J.—That is mere inference. Your charge is the not accounting upon request.] The sixth count shows the neglect more distinctly. It states a neglect to account to the auditor during the current quarter, and a refusal to account on a given day. [PATTESON, J.—The neglect to account in the quarter is only alleged by way of inducement.] The point made respecting the proper description of the commissioners, applies only to the first three counts. The whole allegation is superfluous, or, at most, inducement. It might have been alleged that a union was “duly formed,” without naming the commissioners. The description, however, is sufficient. The act gives them a quasi corporate character and a name of office, which is enough in an indictment, at least since stat. 7 G. 4, c. 64, s. 20, which enacts that no judgment shall be stayed for that any person, mentioned in any indictment, is designated by a name of office, instead of his proper name. Another objection is, that a copy of the order should appear to have been served on the defendants. It is, however, alleged to have been duly *sent* to them, which is all that sect. 18 requires the commissioners to do; and it is further stated that the defendants had notice of the due appointment of Gledhill.

Lord DENMAN, C. J.—The indictment cannot be sustained. An indictment for not accounting once in a quarter would, perhaps, have been good without alleging any order at all; but the offence charged in this indictment is that of refusing to account upon the request of the auditor. This is no offence independently of some specific rule, order, or regulation of the commissioners calling on the defendants to do so, which is not alleged. The other objections are not, in my opinion, of any weight.

LITTLEDALE, J.—The defendants might have been indicted in two ways; for not accounting once in every quarter; or for not accounting as often as the rules, orders, and regulations of the commissioners did direct. This is in substance an indictment for not accounting upon the request of the auditor, which is no offence within sect. 47, unless it appear that there was an order to that effect by the commissioners.

PATTESON, J.—The indictment is evidently founded on that part of sect. 47 which requires overseers to account at such times as the commissioners shall by their orders and rules direct. Now there is no averment of any order by them to account at a certain time, or, indeed, of any order by them to account at all. This vice runs through every count. There is no count for refusing to account once in the quarter, or even to account within thirty days, but merely for not accounting on request. Whether disobedience of an order of the commissioners within sect. 98 be indictable till the third offence, is a point which is not raised. With regard to the other objections, I agree with my Lord.

COLERIDGE, J., concurred.

Rule absolute to arrest judgment.

The QUEEN against The Commissioners of the Navigation of the Rivers THAMES and ISIS.—p. 138.

THIS case is reported, 8 A. & E. p. 901, note (b).

PRICE against POPKIN.—p. 139.

On submission of a cause and all matters in difference between lessor and lessee, the costs to abide the event, an award that certain fixtures have been wrongfully removed by lessor, to the value of 11*l.*, and that lessee shall set up others in their place, to be left for lessor at the end of his term, and that lessor shall pay lessee 11*l.* on a specified day, is bad for want of authority, though the removal of such fixtures was in fact a matter in difference on the arbitration. Held, also, that such award was uncertain, in not specifying the value, quality, or description of fixtures to be set up by the lessee, and might be set aside by the lessor.

An untrue recital, in an award, of an extension of the arbitrator's power by agreement of the parties, will not cure an excess where the truth appears upon affidavit.

COVENANT by lessee against landlord for not repairing the demised premises. There were several pleas on which issues were joined; but, before trial, a judge's order was obtained, whereby "the cause and all matters in difference between the parties thereto" were referred to arbitration, the costs of the suits to abide the event, and the costs of the reference to be in the discretion of the arbitrator.

The award directed a verdict to be entered for the plaintiff on all the issues, and ordered payment of damages in respect of the breaches of covenant. It further recited that "the parties, among other matters in difference, had referred to the arbitrator to say and adjudge whether certain grates, locks, bolts, and fastenings were part and parcel of the demised premises in the declaration named, and further to order and adjudge what should be done to make a final end and determination of such matters in difference," and then proceeded to find and adjudge "that the said grates, locks, bolts, and fastenings were part of the demise of the defendant to the plaintiff, and were removed and carried away by the defendant from the dwelling-house named in the declaration, and applied to his own use, and that such fixtures were of the value of 11*l.* 5*s.*" It then ordered the plaintiff "to fix and set up other grates, locks, bolts, and fastenings in the place and stead of such as were removed as aforesaid, and to leave the same to and for the use of the defendant at the end of the term named in the declaration;" and further directed payment of the said sum of 11*l.* 5*s.*, and of the damages assessed on the breaches, by the defendant to the plaintiff, on a specified day.

In Hilary term last, a rule nisi was obtained on behalf of the defendant to set aside the award, on the grounds, 1, that the arbitrator had no power to direct a verdict to be entered; 2, that the award was bad for uncertainty, in not stating the price, number, quality, description, or value of the grates, &c., to be set up, or in any way ascertaining the same; 3, that the arbitrator had no authority to direct the plaintiff to set up the grates, &c., as directed in the award; 4, that the award, as to the grates, &c., did not pursue the terms of the submission as recited in the award, inasmuch as the question, as there recited, was, whether the grates, &c., were parcel of the demised premises, and the award determined another question, namely, that they had been removed and converted by the defendant.

The affidavit by defendant and his attorney, on which the rule was obtained, stated that a claim had been made by the plaintiff on the reference for damages for divers grates, locks, bolts, and fastenings, alleged to have been removed by the defendant from the premises, but that the defendant "did not in any way agree to refer it to the arbitrator

to order what should be done to make a final end and determination of such claim," and that "there was no new, or special, reference of the said claim, other than the said judge's order."

Several affidavits in answer stated, among other things, that at the time of the reference there were several matters in difference, and that one of them "related to certain grates, locks, bolts, and fastenings, alleged to have been removed by the defendant from the dwelling-house, after the demise thereof by him to the plaintiff;" that during the progress of the reference, it was agreed between the attorneys of the parties to refer to the arbitrator other matters in difference, "including the said question as to the said grates," &c., and the counsel who attended on behalf of the defendant did accordingly contend before the arbitrator that the said grates, &c., were not parcel of the demise. A further affidavit, by an ironmonger, stated that he had been employed by plaintiff after the award to ascertain what grates, locks, bolts, and fastenings were required to be set up in lieu and stead of those which had been removed; that he had ascertained without difficulty, by the marks, from what places they had been removed, and had supplied others, "such as were fit, proper, and suitable for the said house, and such as were usually set up and used in similar houses," and that the same were afterwards set up by the plaintiff in the place and stead of those which had been removed; and that "there was no difficulty in ascertaining either the price, number, quality, description, or value of such grates, &c., or in what places the same were to be set up."

W. H. Watson showed cause. It must be admitted that the award of a verdict cannot stand, there having been no verdict of a jury taken, nor any power to enter one by the order of reference. *Donlan v. Brett*, 2 A. & E. 344, (29 E. C. L. R. 115;) *Hayward v. Phillips*, 6 A. & E. 119, (33 E. C. L. R. 21.) But this may be struck out without affecting the rest of the award; for, as there is a finding and award of damages on each issue, there is a sufficient "event" for the purpose of showing on whom the costs of the action are to fall. As to the objection of uncertainty, the award, in directing fixtures to be placed instead of those taken away, must be intended to mean that reasonably good ones must be placed where the former ones stood. It is impossible to be more particular as to value or kind, nor is it required in similar cases. Thus an award that a party shall do repairs is usual, and sufficiently certain. Mere uncertainty as to the value or amount is not enough to make the award bad, if these can readily be reduced to a certainty; *Beale v. Beale*, 1 Rol. Ab. 251., *Arbitrement*, (H) pl. 14; S. C. Cro. Car. 383; *Hanson v. Liversedge*, 2 Ventr. 242; nor does it appear that there was here any difficulty or dispute on this point; indeed, the contrary is shown by one of the plaintiff's affidavits, and, in fact, the plaintiff has proceeded to replace the fixtures in pursuance of the award. *Cargey v. Aitcheson*, 2 B. & C. 170, (9 E. C. L. R. 52;) *Wohlenberg v. Lageman*, 6 Taunt. 251, (1 E. C. L. R. 376,) are in favour of the award. As to the supposed excess of authority in awarding that the plaintiff shall replace the fixtures, the submission was of all matters in difference; and, notwithstanding the discrepancy in the affidavits, it is sufficiently clear that the question was discussed before the arbitrator. It is found that the fixtures were included in the demise, that they had been removed, and were worth a certain sum, which the defendant is directed to pay. The further direction to replace them at

the plaintiff's expense is in favour of the defendant, to whom they will hereafter belong, so that he has no reason to complain.

Crowder, contra. If the verdict be struck out, there will be no sufficient finding to enable the parties to see who is to pay costs. There is excess of authority; for the order of reference contains nothing that can give the referee power to order what is to be done by either of the parties. If the removal of the fixtures was a matter in difference, the arbitrator had only power to award damages to the plaintiff, as if he had brought an action. But here, coupling the recital in the award with the affidavits, there was at most only a reference of the question, whether certain fixtures were part of the demised premises; and if the award makes an untrue recital, extending the power further to order "what shall be done," this will not bind the Court, when the contrary appears by the affidavits of the plaintiff himself. [Lord DENMAN, C. J., assented.] The arbitrator awards that the fixtures shall be replaced by the plaintiff. [PATTESON, J. If the award would be good without that direction, is not the excess of authority rather for your advantage?] The plaintiff is not bound to replace them with others of equal value, so that, at the end of the term, when the plaintiff is to deliver them up to the defendant, the defendant may find himself in possession of articles of much less value than those which he is said to have demised. This uncertainty is another objection; the award not showing what fixtures had been removed, nor what locks and grates the plaintiff was to substitute. *Pope v. Brett*, 2 Saund. 292. [LITLEDALE, J. It may, perhaps, be intended to mean locks and grates of the same kind as those which were removed.] The words of the award would be satisfied by articles of a very different quality. It has been held, that an award to pay "so much as the land is worth" would be bad, (a) although its value might, perhaps, have been easily ascertained. That the plaintiff has, in fact, replaced these articles since the award, is a matter which can have no effect on the decision of the Court. The plaintiff's affidavit only states that it was easy to ascertain where the old fixtures had been, and what was the price, number, quality, &c., of those which had been set up in their stead. The objection vitiates the whole award, for it can stand only if it be good as to every part referred, and the reference of which formed the consideration for the submission.

Lord DENMAN, C. J. I regret to find myself obliged to decide that this award is bad. The arbitrator had no authority to order any thing to be done with respect to the fixtures; and, if he had such authority, he has given his directions in too uncertain a manner. The award must be set aside, not as to part only, but as to the whole.

LITLEDALE, PATTESON, and COLERIDGE, Js., concurred.

Rule absolute.

(a) See *Titus v. Perkins, Skinn*, 247, 248.

STALEY against FRANCIS BEDWELL.—p. 145.

An interpleader rule directed the sheriff to sell the goods claimed, and pay the proceeds into Court to abide the event of an issue between the claimant and the execution creditor, to try the right to them. The jury, on the trial of the issue, found that part of the goods were the sole property of the claimant, and the residue the joint property of the claimant and the party levied upon: Held, that the claimant was entitled to be paid by the execution creditor the general costs of the feigned issue, (deducting the costs of the issues found for the latter,) and also the costs of appearing to the interpleader rule, and of his subsequent application for the money paid into Court, and for his costs. And the sheriff was refused his costs of the interpleader rule.

ON the execution of a *fi. fa.* at the plaintiff's suit against the defendant, Francis Bedwell, by the sheriff of Gloucestershire, the goods were claimed by Thomas Bedwell, defendant's brother. The sheriff applied for relief under the Interpleader Act, 1 & 2 W. 4, c. 58; whereupon a judge's order was made that the goods seized should be sold, and the proceeds, less the expenses of the sale, paid into Court, to abide the event of a feigned issue, unless the claimant should give security to the sheriff for the return of the goods. The order directed that the issue, on which the claimant was to be plaintiff and Staley the defendant, should contain three counts, to try the following questions respectively; viz., 1. Whether the goods, or any part thereof, were the sole property of the claimant. 2. Whether they, or any part, were the sole property of the defendant, Francis Bedwell. 3. Whether they, or any part, were the joint property of the claimant and the defendant, Francis Bedwell, as partners. The jury were further to be directed to find specially the value of any part of the goods that should be proved to be the sole property of Thomas, or of Francis, or of Thomas and Francis jointly. The sheriff's costs of keeping possession till the time of sale were to be paid by the claimant; the costs of the issue, and the residue of the costs of the sheriff, his poundage, and the return of the goods, to abide the further order of the Court. No security being offered to the sheriff, he sold the goods for 68*l.* 5*s.* 3*d.*, and, after deducting therefrom 3*l.* 8*s.* 3*d.* for expenses, and 12*l.* 10*s.* for rent due at the time of the levy in respect of premises occupied by Thomas and Francis Bedwell in common, paid into Court the residue, viz. 52*l.* 7*s.*, pursuant to the order. Staley, the defendant in the issue, pleaded to the first count that no part of the goods was the sole property of Thomas Bedwell; to the second count, that the goods were, or part thereof was, the sole property of Francis Bedwell; and to the third count, that the goods were, or part thereof was, the joint property of Thomas and Francis, as partners: on all which pleas issue was joined.

The jury, upon the trial of the issue before PATTESON, J., at the Gloucestershire Lent assizes, 1839, found that the goods seized consisted of household furniture worth 32*l.* 13*s.*, and of office furniture worth 32*l.* 4*s.*; they found for the plaintiff, Thomas Bedwell, on all the issues as to the household furniture; and as to the office furniture, they found for the defendant on the first and third issues, and for the plaintiff on the second.

In the early part of this term, Gray, for the claimant, Thomas Bedwell, obtained a rule calling upon the plaintiff and the sheriff to show cause why 26*l.* 8*s.* (being the value of the household goods minus half the rent) and 12*l.* 19*s.* 6*d.* (being half the value of the office goods minus the other half of the rent) should not be paid out of Court to the claimant, Thomas Bedwell; and why plaintiff should not pay claimant

all costs incurred by the seizure of his goods, and of the application by the sheriff; of the feigned issues, deducting the costs, if any, of those found for the now plaintiff, Staley; and of the claimant's application to this Court.

W. J. Alexander for the plaintiff, and *Whitmore* for the sheriff, now showed cause. The latter contended that the sheriff was entitled to the costs of his application under the Interpleader Act, and of this application, as well as to possession-money, as directed by the original order.

Gray, contra. The sheriff should not be allowed the costs of seeking relief under the Interpleader Act, (a) especially in a case like the present, where the finding of the jury and the facts of the case show that he was wrong in taking them. Thomas Bedwell, the claimant, was entitled to the general costs of the cause from the execution creditor, as if the question of property had been tried in an action of trover, in which case a partial failure would not have deprived him of those costs. So the costs of appearing and of this application would equally have been incurred, if Thomas Bedwell had originally narrowed his claim to the goods actually found to be his: he is, therefore, entitled to those costs also.

LORD DENMAN, C. J. The claimant is entitled to receive out of Court the value of the household goods, deducting half the rent, viz. 26*l.* 8*s.* To this must be added a moiety of the office goods, with the deduction specified in the rule nisi. The whole amount is 39*l.* 7*s.* 6*d.* Out of this he is to pay the sheriff the expense of possession, agreeably to the original order, (a) leaving the sum of 34*l.* 9*s.* 6*d.* to be paid out of Court to Thomas Bedwell, the claimant. Then, besides the possession money, the poundage on the amount legally levied, amounting to 16*s.*, is to be paid to the sheriff. The residue, 12*l.* 3*s.* 6*d.*, will belong to the plaintiff in this action. Then, as to the costs of the feigned issues, the case is like that of an ordinary action of trover, with a verdict for the plaintiff on some of the issues; therefore, the claimant is entitled to the general costs of those issues, to be paid by the plaintiff Staley to him, deducting those of Staley on the issues on which he has succeeded. He ought also to have the costs of appearing in the first instance, and of this application. The sheriff is not entitled to the costs of availing himself of the Interpleader Act. The officer grossly misconducted himself in seizing the claimant's goods. It is a case in which the sheriff would not have seized, if he had not relied upon the aid of the Interpleader Act. (b)

LITTTLEDALE and PATTESON, Js., concurred.

COLERIDGE, J. I concur, on the particular circumstances of the case.

Rule absolute for the payment of the several sums of 34*l.* 9*s.* 6*d.*, 12*l.* 3*s.* 6*d.*, and 5*l.* 14*s.*, to the claimant, the plaintiff and the sheriff respectively, with a reference to the master to tax to the claimant the general costs of the cause, (deducting those of the plaintiff on the issues on which he has succeeded,) and also the costs of appearing in the first instance, and of this application; said costs, when taxed, to be paid by plaintiff to the claimant.

(a) See *West v. Rotherham*, 2 New Ca. 527, (29 E. L. R. 408.)

(a) This was taken at 4*l.* 18*s.*

(b) The facts of the case did not appear upon argument.

HOLLAND and Another, Assignees of HAYWARD, a Bankrupt,
against PHILLIPPS.—p. 149.

To *scire facias* by the assignees of a bankrupt on a judgment, the defendant pleaded, 1, denial of the bankruptcy; 2, satisfaction to the bankrupt, on which pleas issues were joined. The Court permitted the proceedings to be amended on payment of costs, by joining the official assignee, (who had been inadvertently omitted as a co-plaintiff,) though the application had been delayed a year and a half after the issuing of the writ; the defendant being allowed to plead *de novo*.

SCIRE facias, issued in November, 1837, by the assignees of Hayward, a bankrupt, to make themselves parties to a judgment recovered by him against the defendant. Defendant pleaded, 1, that Hayward was not a bankrupt; 2, payment and satisfaction to the bankrupt before his bankruptcy. Defendant also gave notice of his intention to dispute the trading, the act of bankruptcy, and the petitioning creditor's debt. Issue was joined, and a copy thereof delivered to defendant, when it was discovered that the official assignee had been inadvertently omitted as co-plaintiff in the writ of *scire facias*. A rule was thereupon obtained in this term to show cause why the proceedings should not be amended by introducing him as one of the plaintiffs.

M. Smith now showed cause. A *scire facias* was formerly supposed not to be amendable: note (4) to *Underhill v. Devereux*, 2 Wms. Saund. 72 p. The practice is different now, and there are authorities for permitting it, providing there be something to amend by, or the proceedings be in paper. In *Thorpe v. Hook*, 1 Dowl. P. C. 501, the amendment was made from the original judgment roll; and it was a mere error in the Christian name of the defendant. In *Baker v. Neaver*, 1 C. & M. 112, the proceedings were still in paper. The defendant may be prejudiced, for he may discharge himself by paying the present plaintiffs, whereas, if the official assignee is a plaintiff, he can only pay to him: 1 & 2 W. 4, c. 56, s. 22. Besides, there has been great delay in correcting the error, for the writ was issued in 1837.

Sir John Campbell, Attorney-General, contra. It is a mere case of inadvertence, which the defendant has taken no advantage of in his pleas. The second plea alleges satisfaction to the bankrupt before his bankruptcy, so that no question can arise about payment to the assignees. The nonjoinder would be no defence upon either plea; and the defendant therefore suffers no prejudice by the amendment, though the plaintiffs may be prejudiced by the error. [LITTLEDALE, J. How can it now prejudice either party?] The defendant may be lying by to take some advantage of the omission hereafter. It is not like asking to alter a judgment, for the *scire facias* is in the nature of a fresh action, and the proceedings, *quoad hoc*, are still in paper. All the assignees together only make one representative of the bankrupt; so that this is in the nature of a mere misnomer. In *Baker v. Neaver*, the official assignee was added after declaration in an action by assignees, and Lord LYNCHBURST, C. B., distinguished the case from that of an ordinary plaintiff, but intimated that the amendment might be refused if the defendant made affidavit that he relied on the omission as a defence. Here no such affidavit has been, or can be made. In *Rex v. Scott*, 4 Price, 181, an amendment of a *scire facias* was allowed after plea.

Per Curiam. (a) The amendment may be made on payment of costs, with liberty for the defendant to plead de novo.

Rule absolute to amend accordingly.

(a) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Ja.

EVANS against REES.—p. 151.

On an issue respecting the boundary of a parish and county, an award in a suit *inter alios*, in which the arbitrator set out the boundary as proved before him, and a verdict was entered according to his direction, is not admissible as evidence of such boundary.

Although verdicts are, upon authority, admitted as proof of reputation, the rule does not extend to awards.

A presentment in a manor court, setting forth the bounds of a manor, is admissible evidence of such bounds, though part of the document, unconnected with the subject of bounds, has been cut out.

Where an ancient manor-book is offered in evidence, the custody must be proved by a sworn witness. It is not enough that the book is produced in court by the counsel or steward of the manor, nor, as it seems, by the lord of the manor in person.

REFLEVIN for cattle taken in the parish of Ystrad Gynlais, in the county of Brecon. Avowry, damage feasant there. Plea, that the cattle were taken in Cadoxton parish, in the county of Glamorgan, and driven thence into the parish and county mentioned in the declaration, and impounded there. Replication, that the cattle were not taken in the parish of Cadoxton and county of Glamorgan.

On the trial before COLERIDGE, J., at the last Brecon Spring assizes, the sole inquiry was as to the true boundary between the above parishes and counties. In the course of it, an award respecting the boundary was tendered on the part of the plaintiff. It appeared that an action had formerly been brought by a commoner for disturbance, to which there was a plea of not guilty, and in which a question arose respecting the same boundary, and a verdict had been taken, subject to the award of an arbitrator, with power to set out the boundary proved before him. By his direction, a verdict was entered for the plaintiff in that suit, and the boundary was determined by the award. The parties to that action were neither the same as, nor in privity with, the parties to this. The learned judge admitted the record in the action, but rejected the award. The defendant offered in evidence certain presentments of a manor court found in the castle of Brecon, in one of which the boundary was set out. Part of it, containing the parish in question, had been cut off, but the part so removed, appeared to have contained entries unconnected with the subject of boundary. It was objected to as inadmissible by reason of its imperfect state. The learned judge admitted it, though he had no doubt that the mutilation was not accidental. The plaintiff also produced certain ancient manor-books, which his counsel proposed to read, without proving the custody from which they came; on the ground, that the lord of the manor, Mr. Leigh, to whom they belonged, and who was admitted to be the real plaintiff, might himself have produced them in court without further proof of custody, and might, therefore, authorize his counsel to do so for him. The learned judge held them inadmissible, unless the custody from which they came was proved. Verdict for the defendant. In this term, (a)

(a) April 22d. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Ja.

Evans moved for a rule to show cause why a new trial should not be granted, on the grounds of the rejection of the award, the admission of improper evidence, misdirection, (b) and that the verdict was contrary to the evidence. The award was admissible on the same principle as a verdict. It was proof of reputation, though *res inter alios*: *Reed v. Jackson*, 1 East, 355. Here the arbitrator was in the place of a jury, and the verdict, when entered, ought to be of the same weight as if actually found by them: *Lee v. Lingard*, 1 East, 401; *Bonner v. Charlton*, 5 East, 139, per LE BLANC, J.: The award, coupled with the verdict, is equivalent to a special verdict. So a decree in equity between third parties has been admitted as evidence of a custom of a public nature; *Laybourn v. Crisp*, 4 M. & W. 320: and analogous instances are mentioned in Bull. N. P. 233. [COLERIDGE, J. A jury could not have set out a boundary, as the arbitrator here professed to do.] The award is founded, indeed, on the evidence of others, but this is equally an objection to the verdict of a jury, who speak only upon the information of others. [PATTERSON, J. I never could understand why the opinion of twelve men should be evidence of reputation. COLERIDGE, J. Though the doctrine is, perhaps, established as to the admissibility of verdicts, it does not appear to be founded on any satisfactory principle. In *Rex v. Cotton*, 3 Camp. 444, on a question of liability to repair a highway, DAMPIER, J., rejected an award as being *res inter alios*, and *post litem motam*. In *Rogers v. Wood*, 2 B. & Ad. 245, (22 E. C. L. R. 64,) an award, not founded on personal knowledge of the facts, was held inadmissible as evidence of reputation.] As to the presentments, their mutilated and imperfect state ought to have excluded them, though they came from the right custody. The presumption is, that the part removed was material, and against the interest of the party producing them, especially as the destruction was evidently wilful. Their state required explanation, like erasures in a deed or other security. Then the plaintiff ought not to have been compelled to call a witness to speak to the custody of the ancient documents. It was enough that counsel, or steward, or any party authorized by Mr. Leigh, produced them. [COLERIDGE, J. If it be necessary to prove the custody of ancient documents, some one must be sworn for that purpose. The person producing them may have had them from a grocer's shop.] So they may have been procured from a shop and taken to the muniment room; yet when produced from that room they would be admissible evidence. Mr. Leigh was the lawful custos, and he might bring them into court himself, or hand them to his counsel or attorney in court. [*Evans* then contended that the verdict was against evidence.]

Per Curiam. There was no misdirection on the last point; with respect to the other points

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an action of replevin, and the question on which it turned was, what is the true boundary of the counties of Glamorgan and Brecon, near the spot where the plaintiff's cattle were distrained? The verdict was for the defendant. On a motion for a new trial, three grounds were stated by the counsel for the plaintiff, on which the Court took time to consider, another ground as to misdirection having been

(b) The refusal to admit the manor books, was called, by the Court and counsel, *misdirection*.

disposed of upon the argument. The grounds were: First, that an award tendered in evidence was rejected by the learned judge.

The award was made very recently in an action on the case brought by a person alleging himself to be a commoner, for digging a ditch, which the present plaintiff asserts to be the true boundary, and so disturbing the right of common. The plea in that case was Not guilty, and the cause was referred at nisi prius, with power to the arbitrator to set out the boundary which should be proved before him, and to direct which way the verdict should be finally entered. He directed a verdict to stand for the plaintiff, and set out the boundary, as he conceived it to be proved, by his award. That award, not being made between the same parties as those in the present action, could not be used as binding upon them, but was offered as evidence of reputation, the boundary being a matter of general and public interest. The cases of *Reed v. Jackson*, 1 East, 355, and *Laybourn v. Crisp*, 4 Mee. & W. 320, and others, were cited to show that a verdict on such matters, although between strangers to the parties on the record, is evidence of reputation; and it was contended that the award in this case was to be considered as part of the verdict, and admissible on the same grounds.

We cannot agree to this view of the case. The authority of an arbitrator is entirely derived from the consent of the parties to the reference; his award has no force except by reason of that consent, and no instance can be proved in which strangers have been held to be in any way affected in their rights by an award, either as evidence of right or of reputation. The award is but the opinion of the arbitrator, formed, not upon his own knowledge, as declarations used by way of reputation commonly are, but upon the result of evidence laid before him, most probably in private, and formed also post litem motam, having none of the qualities upon which evidence of reputation rests. It may be said that the verdict of a jury is equally defective in such qualities. Whether it be so or not, it is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned, but that the principle of those authorities is not clear enough to embrace an award. We are therefore of opinion that the learned judge was perfectly right in rejecting the award.

The second ground was, that a presentment found in the castle of Brecon was admitted in evidence, although a considerable portion of the parchment on which it was written had been cut off, and it was supposed that the part cut off might have contained something adverse to the interests of the party producing it. We are of opinion that no sufficient ground is laid for supposing any thing of the sort, and inasmuch as that part of the presentment which related to the boundary in question was in itself perfect, we cannot see any reason for rejecting this document, and think that it was properly admitted.

The third ground was that the verdict was against the evidence. [On this point his lordship said that the case was one entirely for the jury, and that the Court could not say they had drawn a wrong conclusion.]

Rule refused. (a)

(a) See *Brett v. Beales*, M. & M. 416, (22 E. C. L. R. 344.) It is observable, that in *Reed v. Jackson*, 1 East, 355, the verdict of the jury on the plea of a public right of way, which was admitted to prove the non-existence of such way, seems to have been entered for the plaintiff without any evidence at all, the contest on the trial having been confined to another plea, alleging a right to enter for the purpose of washing sheep.

The QUEEN against LUMSDAINE.(a)—p. 157.

The parochial assessment act, 6 & 7 W. 4, c. 96, does not alter the law as to the rateability of personal property; therefore a poor rate made after the statute, omitting stock in trade which yields a profit in the parish, is liable to be quashed on appeal.

ON appeal against a rate, made June 2d, 1838, for the relief of the poor of the parish of Wimborne Minster, in Dorsetshire, the sessions confirmed the rate, subject to the opinion of this Court on the following case.

The rate, which was in the form prescribed by stat. 6 & 7 W. 4, c. 96, and the rules of the Poor Law Commissioners, was published as required by the statute. No stock in trade was rated in the said rate: there was considerable stock in trade yielding profit in the said parish at the time when the rate was made. The parish contains 12,000 acres or thereabouts, rateable to the relief of the poor. In the year 1833, stock in trade not having been included in a rate made on the 3d of May of that year for the relief of the poor of the said parish, an appeal was entered at the then ensuing Midsummer sessions, on the ground that stock in trade, yielding profit within the parish, was not included in the said rate. The hearing of the appeal was adjourned to the then next sessions, when the respondents abandoned the said last-mentioned rate, and it was quashed, and a new rate was made on the 28th of February, 1834, in which stock in trade was assessed from that time. Stock in trade continued to be regularly rated in the said parish down to the month of June, 1835, inclusive. It appeared from the rate-books of the said parish that stock in trade had not been rated therein from the year 1796 until the said rate of February, 1834, and there was no evidence of stock in trade having been rated in the parish previously to 1796. Stock in trade has not been assessed in the said parish since the month of June, 1835. The question for the consideration of this Court was, whether stock in trade yielding profit in the said parish ought or ought not to have been assessed in the said rate made on the 2d of June, 1838, and if this Court was of the former opinion, then the order of sessions and the rate were to be quashed.

Sir John Campbell, Attorney-General, *Stock*, and *Reade*, in support of the order of sessions.—There has been no express decision, upon argument, that stock in trade is rateable. Lord MANSFIELD inclined against the rateability, and the Court has questioned it in some instances, though it has been reluctantly allowed in others. *Rex v. Witney*, 5 Burr. 2634, *Rex v. Ringwood*, Cowp. 326, *Rex v. Ambleside*, 16 East, 380, *Regina v. Barking*, 2 Ld. Ray. 1280. [PATTESON, J.—Shipping has been constantly rated. There have been cases at Liverpool, Holyhead, Wisbeach, and elsewhere, in which such rates have been held maintainable.(b)] At all events the Parochial Assessment Act, 6 & 7 W. 4, c. 96, determines the point. It is inconsistent with the continued rateability of personal property, and therefore abrogates pro tanto the statute 43 Eliz. c. 2. It gives a form in which rates shall be allowed for the future, and that form does not provide for a rate on any pro-

(a) This case was argued and decided on April 27th, but has been misplaced in consequence of an accidental delay.

(b) See *Rex v. Liverpool*, 8 East, 455, note (d); *Rex v. Jones*, 8 East, 451; *Rex v. Shepherd*, 1 B. & Ald. 109.

perty except real property and corporeal "hereditaments." (a) And the act expressly legislates for parish assessments generally, and not merely for part of the objects of assessment. As the Courts have narrowed the construction of 43 Eliz. c. 2, which is in terms general enough to include all inhabitants in respect of any personal property, so the Parochial Assessment Act further interprets and restrains the statute of Elizabeth, and excludes personal property from its operation. Even affirmative words in a later statute may restrain a former one: *Foster's Case*, 11 Rep. 56 b, *Slade v. Drake*, Hob. 295, 5th ed., (b) *Rex v. Coode*, Cald. 464, S. C. 1 Bott. 307, pl. 290, 6th ed., *Rex v. Justices of Worcestershire*, 5 M. & S. 457. [COLERIDGE, J.—Section 2 of statute 6 & 7 W. 4, c. 96, only provides that the rate shall contain the particulars mentioned in the form, "in addition to" the other particulars required in the rate.] That refers, not to any additional subject of a rate, but to additional particulars respecting the hereditament rated. The proviso in sect. 1, preserving the relative proportions of liability between different kinds of hereditaments, was introduced in consequence of *Rex v. Joddrell*, 1 B. & Ad. 403, (20 E. C. L. R.), and has no reference to personal property. At all events, the rate exactly follows the prescribed form, and therefore it is *ex facie* good, and cannot be quashed. [Lord DENMAN, C. J.—The rate in another form may be bad, but it does not follow that every rate in that form is good.]

Bond and Lucena, contra, were not called upon.

Lord DENMAN, C. J.—It is not improbable that the legislature intended to alter the law upon the subject of rating personal property; but I am clearly of opinion that the intention has not been carried into effect. The object of the act does not appear to have been to introduce any new principle of rating, but to affirm that which had been already established by decisions of this Court. The form given in the schedule certainly contemplates only the rating of corporeal hereditaments, and this is urged as a declaration of the law by parliament upon a point which is suggested to have been before doubtful. There has, however, existed a known and long-established practice of rating personal property in many cases, and the legality of such rates has been affirmed by this Court. The law, therefore, is not to be altered except by express enactment. We cannot, in such a case, admit it to be repealed by implication, where the legislature might so easily have repealed it in direct terms.

LITTLEDALE, J.—Stat. 43 Eliz. c. 2, s. 1, embraces two classes of persons subject to taxation; occupiers of real property, and inhabitants in respect of personal property. Hitherto rates upon the latter class have been in practice confined to stock in trade and shipping; but on future occasions other kinds of personal property may perhaps be rated, and be held rateable. The provisions of this act apply only to the former class of rateable objects, and leave the second at large as before. There is nothing that amounts to a repeal of the law on this head, nor can the act be considered as a declaratory one.

PATTESON, J.—Personal property is rateable if visible and profitable, and this act points at no repeal of the existing law. The provision respecting the uniform mode of rating evidently points at the decisions in *Rex v. Joddrell*, 1 B. & Ad. 403, (20 E. C. L. R.), and similar cases.

COLERIDGE, J.—We are told that we must collect from the act an in-

(a) Sects. 1, 2, 3, and the schedule, were referred to on this point.

(b) See p. 298.

tention to alter stat. 43 Elizabeth, c. 2; but this cannot be done. The Court has always regarded personal property as being within the operation of that statute. The reluctance with which the rateability of it has been admitted by the Court, only tends to strengthen the argument in favour of the rate; and the silence of the act as to the mode of rating one species of property, is evidence that it points only at the other.

Orders quashed.

END OF EASTER TERM.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF QUEEN'S BENCH,
 AND
 UPON WRITS OF ERROR FROM THAT COURT
 TO THE
EXCHEQUER CHAMBER,
 IN
Trinity Term,

IN THE
 Second Year of the Reign of Victoria.—1839.

The Judges who usually sat in Banc in this Term were,
 Lord DENMAN, C. J. PATTESON, J.
 LITTLEDALE, J. WILLIAMS, J.

The cases decided in the Queen's Bench this term, and argued during the term, are reported jointly by Mr. *Ellis* and Mr. *Smirke*; those argued in former vacations, by Mr. *Smirke*; the rest by Mr. *Adolphus* and Mr. *Ellis*.

BENTALL, Esquire, One of the Clerks of the Petty Bag of His Majesty's High Court of Chancery, against Sir WILLIAM ROBERT SYDNEY, Knight.—p. 162.

A party wishing to produce the roll of attorneys in the Court of Chancery as evidence on a trial in K. B., applied to the senior clerk of the Petty Bag Office, to procure an order from the Master of the Rolls for their production, which was granted, according to the usual practice; and the senior clerk was then subpoenaed to produce the roll, he being the proper officer.

Held, that the clerk might claim, for attendance at the trial with such roll, not the common remuneration of a witness appearing on a subpoena duces tecum, but reasonable fees, to a larger amount, which were proved to have been usually paid, for fifty years past, to clerks attending with records from the Petty Bag Office.

Although he did not, when subpoenaed, inform the party that he should demand remuneration as a clerk attending under the order of the Master of the Rolls, and not as an ordinary witness.

And although he did not produce the roll himself, but sent it by his clerk.

DECLARATION (filed in the Petty Bag Office in Chancery) in debt, for 20*l.*, fees and reward due and owing, and of right payable, from and by

defendant to plaintiff as senior clerk of the Petty Bag of the Court of Chancery at Westminster, for the work and labour, care, diligence, journeys, and attendances of plaintiff, by him done, performed, and bestowed at defendant's request, and for divers attendances with divers rolls and books containing the enrolment of the admission of solicitors of the Court of Chancery aforesaid, and other records, before that time made and bestowed by plaintiff as such senior clerk in his Majesty's Court of King's Bench at Westminster, and elsewhere, at defendant's request. Counts for other work, for money paid, and on an account stated. Pleas: Never indebted; and payment of 1*l.* 13*s.* in full satisfaction of the debt and damages as to that sum. Issues thereon.

Particulars of Demand.

1836. June 13th.	Petition, and paid for order of the Master of the Rolls to produce the Solicitors' rolls on trial in the Court of King's Bench at Westminster	-	£0	12	0	
14th.	Attending the Court of King's Bench with three books	- - - - -		1	1	0
	Paid cab hire there and back with books	- - - - -		0	2	0
15th.	The like	- - - - -		1	3	0
16th.	The like	- - - - -		1	3	0
17th.	The like	- - - - -		1	3	0
				5	4	0
	Received on account	-		1	13	0
				£3	11	0

On the trial before LITTLEDALE, J., at the sittings in Middlesex in Michaelmas term, 1837, the following facts appeared.(a)

The defendant was desirous of having the Rolls of the Court of Chancery to give in evidence in a cause of *Hill v. Sydney*; and he applied to the plaintiff, who was the senior clerk in the Petty Bag Office, to get an order from the Master of the Rolls for their production, which order the plaintiff procured.(b)

The plaintiff was served with a subpoena duces tecum to produce these rolls on the trial of the cause, which was set down for the 14th June, on which and the three following days one of the clerks in the Petty Bag Office attended the Court of King's Bench. On the last of those days the cause was tried, and the rolls were produced by the clerk, and put in evidence. The rolls were contained in three folio volumes, more than he could well carry from Chancery Lane to Westminster; and he carried them backwards and forwards in a coach.

In the office of the Petty Bag the ordinary common law business of the Court of Chancery is transacted. There are three principal clerks in the Petty Bag Office; and they have no salaries, but are paid by fees:

(a) The ensuing statement in the text is that which was given in the judgment of the court. See p. 167, post.

(b) The order was as follows.

"Monday, the 13th day of June, in the 6th year." &c.

"Ex parte Sir Robert Sidney, Knight. Upon the humble petition of the said Sir Robert Sidney this day preferred unto the Right Honourable the Master of the Rolls, for the reasons therein contained, it is ordered, that the proper officer do attend with and produce the roll of solicitors of this court on the trial of a certain action brought against the petitioner, which is to be tried in the Court of King's Bench."

they jointly appoint a deputy clerk, who has a fixed salary; and he appoints clerks who are paid by him. The plaintiff is the senior of the three principal clerks; and as such he is entitled to the custody of the rolls in the Court of Chancery. It is the official business of the plaintiff to produce the rolls by himself or his clerk; generally by his clerk; and that business belongs exclusively to him, and he alone receives all the fees and emoluments which arise in respect of it: but some branches of the business of the Petty Bag are paid by fees, which are divided amongst the three principal clerks.

When the subpoena was served, and order obtained, one guinea was paid for attendance, and 12s. for the order; and the sum which the plaintiff sought to recover in this action was three guineas for three days' further attendance after the first day, and 8s., being 2s. a day, for four days' coach hire. The clerk saw the defendant at his office the first day. The clerk asked the defendant if he was to attend on the following day: the defendant said "certainly." The clerk asked the defendant for the fees for the next day's attendance. The defendant said there was a great probability of the cause not being tried that day, but it would the following day, and that the fees should then be paid all together. The clerk, at a subsequent time, told the defendant that the plaintiff had desired him to say that if he the defendant would pay the plaintiff the fees claimed, the plaintiff would forego any costs. The defendant said that if Mr. Bentall had chosen to wait till the cause of *Hill and Randall v. Sydney* was settled, then the fees would have been paid, but it was only on that principle that he resisted.

It appeared that in the year 1743 Lord HARDWICKE, then Lord Chancellor, made orders as to fees in the offices in the Court of Chancery: and amongst those in the Petty Bag Office there was a direction^(a) that: "For attending with any record out of the office, the clerk attending is to be paid a reasonable fee, according to the time of such attendance."^(b) Evidence was given that for between forty and fifty years a guinea a day had been regularly paid for attending a Court with the rolls, and it had occurred hundreds of times, and never been known to be resisted but once.

Kelly, for the defendant, contended that, on these facts, the plaintiff was not entitled to recover. The learned judge directed a verdict for the plaintiff, giving leave to the defendant to move to enter a nonsuit. In the ensuing term a rule nisi was moved for accordingly. The grounds of the motion were, that no compensation beyond that of an ordinary witness could be claimed for the attendances in question; and that, if such right did not exist originally, it could not be given by the defendant's subsequent promise; to which points *Collins v. Godefroy*, 1 B. & Ad. 950, (20 E. C. L. R.,) was cited. It was also suggested that the compensation, if claimable at all, should have been sued for, not by the plaintiff, but by the clerk who actually produced the document. A rule nisi was granted.

In Easter term, 1839,^(c) Sir *F. Pollock* and *Hoggins* showed cause,

^(a) The reception of this order in evidence was objected to on the trial; and the objection was again mentioned in argument on the rule, but became ultimately immaterial.

^(b) See Beames's General Orders of the High Court of Chancery, where the whole of Lord Hardwicke's order is set out; pp. 369—449. The paragraph in question is p. 404.

^(c) May 2d. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

and *Kelly* supported the rule. The whole argument is so fully gone into in the judgment of the Court, that no further report is necessary.

Lord DENMAN, C. J., in this term (June 5th) delivered judgment. After stating the nature of the action, and the facts, as detailed, p. 164 to 166, ante, his Lordship continued.

Mr. *Kelly* applied for a nonsuit, which my learned brother gave him leave to move for. The rule was argued last term; and it was urged, on the part of the defendant, that the case must be governed by *Collins v. Godefroy*, 1 B. & Ad. 950, (20 E. C. L. R.), where the Court held, upon a review of the cases, and the construction of stat. 5 Eliz. c. 9, s. 12, that an action does not lie for a compensation to a witness for loss of time in attendances upon a subpoena, though the plaintiff there was an attorney, and contended that, being a professional man, the rule ought not to apply to him. It was also contended that the subsequent promise to pay made no difference, if there was no original consideration for the demand, as was held in *Collins v. Godefroy*; and that Lord HARDWICKE had no right to impose a fee by which the King's subjects could be bound; and that, if he had such right, the defendant ought to have had notice of the fee; and that, as the plaintiff accepted service of the subpoena without telling the defendant that he did not consider himself bound by the common obligation of the service of the subpoena, but that he should require payment according to Lord HARDWICKE's order, he cannot now insist that he stands upon a different footing from any person who is served with a subpoena. And it was also contended that the plaintiff, not having personally attended on the production of the rolls, is not entitled to the fee.

We think that the rolls of the Court of Chancery cannot be taken out of the Court to be given in evidence as a matter of course; and that neither the Master of the Rolls, nor the plaintiff as the senior clerk in the Petty Bag office, would be compellable to produce them on a subpoena alone; but there must be an order of the Master of the Rolls for that purpose. These records are open to public inspection, and anybody wishing for a copy of them may have it in the usual way, upon paying for it: or a party may, if he prefers, apply to the Master of the Rolls for an order that the rolls themselves should be produced; and he is in the habit of granting such orders: but he would not suffer the rolls to be carried out of the office by anybody but one of the officers of the Court: and it is not reasonable that the officers of the Court should leave their duties for the purpose of carrying these rolls wherever a party in a cause may wish, without being paid for their trouble and attendance. And, whether Lord HARDWICKE had a right to constitute legal fees by his orders or not, yet this was a fee which was so far optional with those who wanted the records out of the office that, as they were not entitled to have them out of the office of right, but only on an application to the Master of the Rolls, if they chose to have them, they were bound to pay for them a reasonable fee according to the terms imposed by Lord HARDWICKE.

These orders of Lord HARDWICKE of 1743, are stated in Beames's Orders in Chancery, 369:(a) and the part which relates to a clerk of the Petty Bag office attending with the records is in page 404. The obligation to attend the Court arises no doubt from the subpoena; but that subpoena is served upon a person who in the ordinary course of

(a) See p. 166, note (a), ante.

things is not primarily bound to attend to it; it originates with the Master of the Rolls; and he or the Chancellor may very reasonably say that he will not grant an order for the carrying the rolls to and fro, unless the officers are paid for their trouble: and we think we are not to confine the necessity of obeying the subpoena to the service, as in *Collins v. Godefroy*, 1 B. & Ad. 950, (20 E. C. L. R.,) but we must also look to the order of the Master of the Rolls.

We think it not necessary that the defendant should have had notice of any order of the Chancellor as to a remuneration to the officer of the Petty Bag. If a defendant, instead of applying for an examined copy of such part of the rolls as he wants, chooses to get an order for their production, he must be supposed to be cognisant of the rules of the office in that respect, and which, independent of Lord HARDWICKE's order, have prevailed between forty or fifty years; and there was no necessity for the plaintiff to tell him that he relied upon the order of the Master of the Rolls, and did not consider himself bound by the obligation of the subpoena as in ordinary cases; and the statements of the defendant on two occasions are quite sufficient to show that he was acquainted with the custom of the office.

We think it no objection to the plaintiff's right to recover, that he did not personally attend. According to the custom of the office the duty of producing the records was cast upon him; but there was nothing personally requiring his attendance; it was the same thing whether one of the clerks or another had the custody of the rolls to produce, as long as they were in the keeping of the officers of the Court of Chancery; in fact the plaintiff scarcely ever personally attended; but the fee was due to the plaintiff whichever of the clerks attended.

Indeed it is singular enough, as to the Petty Bag, that if issue be joined the Chancellor delivers the record with his own hands to the King's Bench to be there tried; 4 Inst. 80, 1 Equity Cases Abridged, 128:(a) but, if the record be delivered by the clerk of the Petty Bag, it will be well removed; for that may be said to be propria manu of the Chancellor, which is done by his officer; 1 Equity Cases Abridged, 128, 129.(b)

We think, therefore, this case does not fall within *Collins v. Godefroy*; for the plaintiff does not attend merely in consequence of the subpoena; for that alone would not have been sufficient to compel him to produce the rolls: but he attends in consequence of the order of the Master of the Rolls and the subpoena together: and we think that the plaintiff is entitled to recover a reasonable compensation for his attendance on the production of the rolls.

The rule, therefore, must be discharged.

Rule discharged.

(a) *Courts and their Jurisdiction*, (A), pl. 7.

(b) *Ibid.*, pl. 8.

The QUEEN against THOMAS BRIGHTWELL.—p. 171.

Where a given number of aldermen was to be elected on a given day, under stat. 5 & 6 W. 4, c. 76, s. 25, which prescribed no particular mode of electing (see now stat. 7 W. 4 & 1 Vict. c. 78, s. 14), the proper mode was to put to the vote a list containing as many names as there were vacancies to be filled up, any elector being at liberty to propose and have put to the vote a list of his own.

QUO WARRANTO information for exercising the office of an alderman

of the city of Norwich. Pleas, alleging that defendant was duly elected by the councillors of the city first elected under stat. 5 & 6 W. 4, c. 76, being assembled together for the purpose of electing aldermen. Replication. 1. To the first plea: "That, at the meeting and assembly of the said councillors in the said plea mentioned, at the time when they so met and assembled together at the Guildhall for the purpose of electing the said aldermen as in the said first plea mentioned, John Barwell," &c. (naming sixteen persons, among whom was the defendant), "were by one William Foster, one of the said councillors of the said city, proposed jointly and together for aldermen of the said city; and that it was then and there by the said William Foster proposed that the said last-mentioned persons, together with the said defendant Thomas, should be elected jointly to be aldermen of the said city, and the same were then and there by the greater part of the said councillors, so assembled as last aforesaid, jointly and together voted and declared to be elected and chosen aldermen of the said city;" and "that there was not then and there, nor at any other time, any separate proposal nor any separate vote nor declaration made to or come to by the said councillors or any of them, that the said defendant Thomas should be or was elected an alderman of the said city: without this, that the greater part of the said councillors so assembled as last aforesaid did duly elect the said defendant Thomas to be one of the aldermen of the said city in manner and form, &c.: verification. Replication, 2. To the same plea, that the greater part of the said councillors, &c., did not duly elect defendant to be one of the aldermen, &c. Conclusion to the country. (The other pleas were replied to in similar form.) Rejoinder, to replication 1, that the greater part of the said councillors so assembled, &c., did duly elect, &c., in manner and form, &c.: Conclusion to the country. To replication 2, similiter. Issues were tendered and joined on the other parts of the replication, all raising the same question.

On the trial before PARK, J., at the Norfolk Spring assizes, 1837, it appeared that at the meeting of councillors for the election of aldermen, on December 31st, 1835, there were sixteen aldermen to be elected, and an individual councillor presented to the chairman a list of sixteen, including the defendant, and moved that all the names in that list should be adopted. A councillor present objected to the names being put jointly, and, without resisting the adoption of any in particular, which he said would be invidious, proposed two others, to be added to the list. This was put to the vote, and negatived. The names first mentioned were then read to the meeting, and the chairman asked if any other name was proposed. The adoption of the list was then voted, by a single resolution. When the objection was made to voting by lists, the chairman said that any person objecting to the list produced might propose another; or that any particular name in the list then proposed might be objected to. The chairman stated, on the trial, that "nothing was done or said to prevent any other nominations." The learned Judge (after referring to *Rex v. Monday*, 2 Cowp. 530, and *Rex v. Player*, 2 B. & Ald. 707,) stated to the jury, as his opinion, that the mode of proposing the names was improper, and the election void. Verdict for the Crown. Sir J. Campbell, Attorney-General, in the ensuing term obtained a rule to show cause why a verdict should not be entered for the defendant (leave having been reserved so to move), or a new trial had. In Hilary term, 1839,(a)

(a) January 26th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

Sir *W. W. Follett, Kelly, and O'Malley* showed cause. The only question is whether, on an election of aldermen, the proposing of names in a batch be correct or not. Stat. 7 W. 4 & 1 Vict. c. 78, s. 14, gives a direction on this subject prospectively: but stat. 5 & 6 W. 4, c. 76, s. 25, the only enactment in force as to such elections at the time in question, furnished no regulation; the case must therefore be decided by the ordinary rules of corporation law. The practice here adopted is in itself not reasonable: for, when sixteen names are put up together, a person who wishes to elect one particular candidate is compelled to vote for fifteen whom he may not approve of. There is no opportunity for the electors to exercise a judgment or declare an option respecting individual candidates, as on elections to parliament: no opinion is taken as to any one. If the list is adopted unanimously, the unanimity may be only apparent. The authorities support this objection. In *Rex v. Monday*, 2 Cowp. 530, Lord MANSFIELD disapproved of seven candidates at once being proposed for the office of alderman; and in *Rex v. Player*, 2 B. & Ald. 707, where the common council of Gloucester admitted seventy-nine persons to be honorary freemen of the city by one vote, this Court, referring to *Rex v. Monday*, granted a quo warranto information. Those cases are still law, where the late acts have not introduced any special provision.

Sir *J. Campbell, Attorney-General, B. Andrews, Palmer, and Byles*, contra. The mode here adopted is the preferable one, where a given number of officers is to be elected in a given day. In *Rex v. Player* the election was not for the purpose of filling vacancies, but of adding to an indefinite body of honorary freemen; there was no inconvenience, therefore, in electing them separately; and, as no one could be chosen if any member of the common council dissented, it was proper that each should be proposed apart. Here sixteen aldermen were to be elected on the 31st of December, by forty-eight councillors. Every one might have sixteen candidates to propose: must there then be 768 polls? The argument for the Crown is, that each individual must be voted for by a majority of the electors present; but that might never happen to any candidate if there were three parties in the council, nearly balanced. [Lord DENMAN, C. J. The same observation would apply to lists.] Any one of the electors here may have voted for any one of the candidates; and it must be supposed that in assenting to the lists they did vote for the several persons named in them, as if each name had been repeated. Where the vote is to be in the affirmative or negative, the names must be proposed singly; but, where the choice is to be exercised merely by nomination of one in preference to another, the elector may vote for several at once; and this is the case in elections of members of parliament where more than one are to be returned. Nothing was done or said here to prevent any elector from offering an additional list. In *Rex v. Monday*, 2 Cowp. 530, the defendant was not elected, because there was a majority of votes against the list proposed, in which his name was. The remarks of Lord MANSFIELD, as to the mode of proposing the names, were made obiter, and are not applicable to the case where a certain number of vacancies must be filled up on a given day. [Lord DENMAN, C. J. We will consider of this case, and shall be careful in the decision, if it be only to lay down a rule for other cases which are not within the act, 7 W. 4 & 1 Vict. c. 78.] *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (June 6th), delivered the judgment of the Court.

On the trial of this *quo warranto* before Mr. Justice PARK, the objection to the defendant's title was, that the mayor had proposed to the elective body a list of sixteen persons given in by an elector, that being the number of vacancies then to be filled up, offering at the same time to receive any list of sixteen or a less number that any elector might propose, but refusing to take the votes of the whole assembly on each particular candidate. The learned Judge thought that the rule laid down in *Rex v. Monday*, and *Rex v. Player*, 2 B. & Ald. 707, ought to have been followed, and directed a verdict for the Crown, but with leave for the defendant to move that the verdict be entered for him, if the Court should not take the same view of the law.

That rule was properly applied where an indefinite number of honorary freemen was to be elected. The reason is obvious. In that case the claim of each is essentially distinct, and his individual fitness or unfitness is alone to be determined. This cannot be done when electors are required to vote for or against many candidates at once. They may think it so desirable that A. should be a member of the corporation, from respect and confidence in him, that his election would be cheaply purchased by receiving B. and C., both of whom they may deem wholly unfit for the office; or, on the other hand, may think him so highly objectionable, that it is better to exclude a long list of well-qualified persons than permit him to come among them. Everything would, therefore, unavoidably run into bargain and compromise, where they would be obviously unnecessary and improper, and even inconsistent with the direct purpose of such an election, which need not take place at all, and which calls on the electors to exercise no other judgment than on the competency of each individual proposed.

But it seems to us that, when a certain number of persons is to be elected as an official body, that very principle is the only one that can reasonably be acted on. I may consider A. perfectly fit for one of the places to be filled, provided only that B. or C. should occupy another of them. The point on which the voter must exercise his judgment is, not whether A. would be a good alderman, but whether A. and others would form a good board of aldermen. The proposer of the list lays it before the assembly, as the board which he recommends. Each elector had the opportunity of proposing his own board, or each those persons who ought, in his opinion, to be elected at all events, whatever others may find a seat there.

The defendant's counsel contended that by taking the votes for individuals singly the purpose of the election might be wholly defeated, as there might be no majority in favour of any one, though there was one in favour of the definite number. But it is possible that there might be an equality of votes for two or any other number of the candidates in the list; the probability is less, but that is all.

On the part of the Crown it was also asserted that the nomination and election of a member of parliament, the most solemn form of election known to our law, proceeds always on the single-handed rule. This is hardly true as a practical proposition: for, though the nomination is separate, and the show of hands taken on each, which may be final, it is not necessarily final. The freeholder who nominates A., in hopes that B. will be his colleague, is free to ask for a poll, and vote

against A. if he sees that B. cannot succeed, and that A.'s colleague will neutralize A.'s services, or make him an objectionable member. If the election is decided by the poll, every voter has the power of giving in his list, and does give it in, by voting for four, three, two, or only one, if he thinks proper. This is precisely what was done in the election from which this quo warranto arose.

The number of votes so taken affords a true measure of the confidence reposed in each and all the candidates by the whole body of voters.

The act of 7 W. 4 & 1 Vict. c. 78, which received the royal assent in July, 1837, was passed after this election, and after this rule was obtained: it cannot, therefore, as a matter of law, regulate what was then done. But the mode of election there enjoined by the legislature, to be observed hereafter and permanently, cannot be considered as opposed to the sound general principles for conducting similar elections: and the fourteenth section makes the general law for the future in exact conformity with the practice observed when this defendant was elected.

Rule absolute.

The QUEEN against The Lords Commissioners of Her Majesty's Treasury. (In the Matter of LOXDALE.)—p. 179.

The "common clerk" of a borough, before 5 & 6 W. 4, c. 76, (Municipal Corporation Act,) had always executed, by himself or deputy, the offices of clerk of the peace and clerk of the justices, as incidental to that of common clerk. The first town council, elected after that act, appointed him to the office of "town clerk," which he declined to accept, on the ground that the office was essentially a different one; and he claimed compensation as upon a loss of the entire office of common clerk. The council refused any compensation; and the Lords of the Treasury, on appeal and hearing of all parties, decided that, as he was re-elected town clerk, he was not entitled to compensation for such part of his emoluments as appertained to that office; but, as he was not re-elected to the offices of clerk of the peace or clerk of the magistrates, he was entitled to compensation for the emoluments of the common clerk acting as clerk of the peace and to the justices; and they awarded to him an annuity "for the loss of his office of common clerk." Held, that the Lords had sufficiently adjudicated on the whole subject of appeal: and the Court refused a mandamus to them to hear and determine the merits of it.

If the Lords have in fact heard and determined an appeal under sect. 66 of the act, this Court will not interfere by mandamus, though it may be satisfied that compensation has been awarded on an erroneous principle.

In last Hilary term, Sir *W. W. Follett* obtained a rule to show cause why a mandamus should not issue, commanding the Lords Commissioners of Her Majesty's Treasury "to hear and determine the merits of the appeal of James Loxdale on his claim to compensation for the loss of all the emoluments of his office of common clerk of the borough of Shrewsbury, in the county of Salop." The affidavit on which the rule was obtained recited the governing charter, 14 Car. 1, which directed that there should be "one honest and proper man, skilled in the law," who should be called "common clerk" of the town, and who, by himself or deputy, should write and make all recognisances to be taken before the mayor or other justices within the town, and should transcribe the same and all laws and ordinances, &c., ordained by the mayor, aldermen, and assistants, and all proceedings and acts of the court at the sessions of the peace held for the town; and should make, write, and enrol all pleadings, &c., and acts of court in the court of record in the same town,

and in the other courts held there; and should make all writings and muniments concerning the mayor, &c., in right of the town; and do and execute all other things belonging to the office of common clerk. The office was to continue till death or resignation; and there was a power given to the recorder, steward, and common clerk to appoint deputies respectively during pleasure. The claimant, who was a barrister, was elected to the office of common clerk in September, 1833, and appointed under the common seal. He continued to fill the office till the passing of the Municipal Corporation Act, stat. 5 & 6 W. 4, c. 76, when the town council ordered that "James Loxdale, Esquire, be re-appointed town clerk" of the said borough; but he declined to accept the office. The town council thereupon elected another to that office, and also appointed a Clerk of the Peace. The borough justices also appointed a clerk to the justices. These offices had been always theretofore executed by the common clerk or his deputy. In August, 1836, Mr. Loxdale delivered a statement to the council, claiming to be compensated for the whole amount of the emoluments of his late office, (without deducting the value of those which appertained exclusively to the office of town clerk,) on the ground that the new office was essentially different from the old one of common clerk, and that the latter was in effect abolished. The council disallowed the whole of this claim. Mr. Loxdale then appealed to the Lords of the Treasury, to whom he submitted a memorial: the town council replied to it: and the claimant transmitted to the Lords observations upon the reply. He was then called upon by the Lords of the Treasury to furnish a statement of the different heads of receipt, so as to distinguish in what character and on what account he received each. This statement was accordingly furnished, and was sent by the Lords of the Treasury to the town council for their observations, which were again submitted to the claimant for his reply. On 18th January, 1839, the following Treasury minute, dated 11th January, containing the award of the Lords, was notified to him.

"Read several papers on the appeal of Mr. Loxdale, late common clerk of the borough of Shrewsbury.

"Read the opinion of the law officers of the crown, whom my lords considered it necessary to consult on the case.

"Read minutes of this board on the subject of compensation to town clerk of the 10th September, 1835.

"Upon a full consideration of the papers before them, and the opinion of the law officers of the crown, my lords consider that, as Mr. Loxdale was re-elected to the office of town clerk, he is not entitled to compensation for such part of his emoluments as appertained to the office of town clerk; but that, as he was not re-elected to the office of clerk of the peace, or clerk to the magistrates, he is fairly entitled to compensation for the loss of the emoluments he would have lost, although he had continued as town clerk when re-elected, and which were received by the common clerk acting as clerk of the peace and clerk to the justices. Having before them the account furnished by Mr. Loxdale, my Lords are pleased to award to him an annuity of 120*l.* per annum, as compensation for the loss of his office of common clerk, such compensation to commence from 6th May, 1836, and to continue for his life."

It further appeared that the limits of the borough had been greatly contracted by the Municipal Corporation Act, and that the business

incident to the office of town clerk had been consequently much diminished.

On the part of the corporation, it was stated that there was no distinction between the offices of town clerk and common clerk, but that it had been called and known as well by one as the other name; and numerous entries in the corporation records were produced, in which the former name was used: that the claimant had constantly called and signed himself "town clerk;" and that he had refused to furnish to the town council separate accounts of the emoluments attached to each function of his office. Other facts were also stated upon the merits, to which it is not necessary to advert.

Sir John Campbell, Attorney-General, Sir Frederick Pollock, Wightman, and Austin, showed cause. The decision of the Lords of the Treasury is a right one. At all events, if they have regularly heard and determined the appeal, the decision is final, and cannot be reviewed by this Court. The office of common clerk and of town clerk are identical; the act has only altered its tenure, and deprived it of some emoluments formerly incidental to it. It is indeed true that it can no longer be executed by deputy; but this, and the other alterations, are only "circumstances" (sect. 66) to be considered in awarding the compensation. If the office is a new one, then Mr. Loxdale might have accepted it, and yet claimed compensation for the whole of the lost office; which will hardly be said. The appellant claims for the loss of *all* his emoluments; whereas, having refused to accept the office of town clerk, the act has provided for him no compensation in respect of that office; but, as the two other appurtenant offices were, at all events, lost to him, whether he continued in the office of town clerk or not, compensation has been awarded in respect of them. *Rex v. The Mayor, &c., of Bridgewater*, 6 A. & E. 339, (33 E. C. L. R.,) supports the decision. There the common clerk was re-appointed town clerk; and the compensation was "limited to those emoluments which were received for duties subordinate and incidental to the old office:" per COLERIDGE, J., *ibid.* At all events it appears that the Lords Commissioners have heard and determined the case; and the minute expressly gives compensation for the office of "common clerk," just as if that office had, in fact, been abolished. It has, indeed, been said by the Court that there must be some way of reviewing such decision. [Lord DENMAN, C. J.—We have not exactly laid that down. We said there might be cases in which we might be able to do so.(a)] The inconvenience of interference will be very great. The object of the act, which (sect. 66) makes the order "binding on all parties," can hardly be satisfied, unless the Lords can determine both law and fact. They cannot direct an issue, nor take the opinion of a court.

Cresswell, E. V. Williams, and L. Peel, contra. The office to which Mr. Loxdale was appointed is a new one. In *Rex v. The Mayor, &c., of Bridgewater*, COLERIDGE, J., so describes an office in a similar case. It is like the Common Clerkship of Bristol, where the charters require a barrister to be appointed.(b) It would be absurd to suppose that the

(a) See *Ex parte Lee*, 7 A. & E. 129, (34 E. C. L. R. ;) *Regina v. Mayor, &c., of Norwich*, 8 A. & E. 633, 637, (35 E. C. L. R. ;) *Regina v. Lords of the Treasury (In the Matter of Tibbits)*, post.

(b) See the Bristol charters of 36 Car. 2 and 9 Ann., Seyer's Bristol Charters, pp. 276, 307, (4to. 1812). See Appendix to the First Report of the English Municipal Corporation Commissioners, Part II. pp. 1160, 1165, 1166.

burden of compensation could, in that case, be avoided by appointing the barrister to the new office of town clerk, of which the duties are now inconsistent with the practice of his profession. So here the charter requires a person "skilled in the law," to be appointed, which has been usually construed to mean a barrister. The re-election was a mere device to deprive the party of compensation for an office which was, at most, only nominally the same. The duties of common clerk are specified in the charter, and they include duties which do not usually devolve on a town clerk. If the claimant had united three distinct offices, then there would have been some ground for giving a partial compensation for one or two of them; but here it was one entire office, and no part could be separately resigned or granted. Two of the incidental duties, viz. those of clerk of the peace and clerk of the justices, have become incompatible by the provision of the act itself; sect. 102. It is therefore impossible to re-elect to the old office. [LITLEDALE, J.—If he had accepted the same office with twice the duty and half the profit, could he have demanded compensation?] The proper course, to entitle him to compensation, is to refuse it. The power of the Lords to make such order as to them "shall seem just" will not authorize them to make one at variance with the intent of the act, which is, obviously, to give compensation for every lost office. Here they have only compensated for the loss of part of it; and this on the ground that the party has been offered an office involving *some* of the duties of the old one. It may be conceded that, if they had awarded the compensation to be paid as upon a loss of the whole office, the award would have bound all parties; but, though the minute professes in terms to do this, it is evident that the office of "town clerk" only is meant. The names of office are there treated as synonymous, otherwise it would be self-contradictory. Either they have given compensation for the whole, which is repugnant to the admission on the other side that he has received, and was only entitled to, compensation for part; or they have awarded compensation for part only, in which case they have not exercised their jurisdiction by making any award of compensation in respect of the rest. In effect, they have only in part decided, and may therefore be compelled to rehear and decide as to the whole. In *The Attorney General v. The Corporation of Poole*, 4 Myl. & Cr. 24, Lord COTTENHAM'S language suggests a doubt whether the reappointment must not be *accepted*, as well as granted, in order to deprive the party of his right to compensation. [PATTESON, J. Your argument goes to this extent: that, if the office of town clerk had been accepted, even with a higher salary, Mr. Loxdale might still have had compensation for all.]

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day in this term (Monday, 27th May,) delivered the judgment of the Court.

This was an application by Mr. Loxdale, late common clerk of the town of Shrewsbury, for a mandamus to be directed to the Lords Commissioners of the Treasury, commanding them to hear his statement of the loss sustained by him by reason of being deprived of his said office of "common clerk" and to award him a compensation for such loss. [His lordship, after stating the reappointment of Mr. Loxdale, his refusal to accept the office of town clerk, the disallowance of compensation by the town council, his appeal, and the Treasury minute, as above, proceeded as follows.] It is upon the form of this minute that the application for a mandamus has been chiefly founded; it having

been contended that it clearly appears therefrom that Mr. Loxdale's claim, or at least *a portion of it*, was never heard or considered *at all*. And that is the real question; because it was properly conceded in the argument (by analogy to the course uniformly pursued by the court in awarding or refusing the writ of mandamus to justices, &c.) that, if the lords did hear and consider the case, a mandamus ought not to go, even if the court should be satisfied that the compensation had been awarded upon an erroneous and mistaken principle.

The language of the 66th section, as to the manner of making compensation by the council, is, that an adequate compensation is to be assessed by the council for the salary, fees, and emoluments which the person shall so cease to hold, regard being had to the manner of his appointment to the said office, and his term or interest therein, *and all other circumstances of the case*; and, as to the appeal, that a person thinking himself aggrieved may appeal to the Lords of the Treasury, who shall thereupon make such order as to them shall seem just, and such order shall be binding upon all parties. And we think that it must be understood that the appeal is to be conducted upon the same principle as the original hearing before the council, *with regard to all the circumstances of the case*.

The most favourable view of the subject for the applicant we presume to be, to *suppose* that the office of common clerk has been abolished, because that was contended for by his counsel, though we beg to be understood as expressing no such opinion. Supposing, however, that to be so, what is the fair import of the Treasury minute? We think it is quite apparent that the Lords were considering the value of *the lost office*, because (what they, obviously, deemed to be) its component parts are analysed; and those were, clerk of the peace, clerk of the justices, and town clerk. For the two former, which they treated as lost, and under circumstances to call for compensation, they awarded the above-mentioned annuity; but for the latter, nothing; and give as a reason, that he might have had the office of town clerk if he had chosen. This, therefore, seems clearly to show that the Lords of the Treasury had the lost office (and all the parts of it) full under their notice. Suppose one part of the emoluments of the common clerk to have been a house of the value of 100*l.* per annum, and that, upon the change, the same house had been offered to him, which, for some reason, he had refused, could it possibly have been contended that such refusal was not a *circumstance* for the consideration of the Lords of the Treasury? And yet what is the material distinction? But we forbear to follow the investigation of the *principle* of the decision, the only question being, whether the Lords have heard and decided *at all*, because if they have, that decision is, by the act, expressly declared to be final. The fallacy seems to be in inferring that, *because* nothing is allowed to the applicant in respect to that part of his former duty, which they designate as the *town clerk's*, *therefore* his claim has never been under consideration by the Lords of the Treasury at all. We, however, have arrived at a contrary conclusion; and the consequence is, that the rule must be discharged.

Rule discharged.

NORRIS against SMITH.—p. 188.

Where a clause in a statute (50 G. 3, c. cxlix. s. 105, local and personal, public) required thirty days' notice of action for any thing done in pursuance of it, and enabled the party complained of to tender amends for any irregularity: Held, that a letter written to the defendant, who justified under the act, requesting him to communicate the names of certain parties, and stating that, unless the request was complied with, the plaintiff would "take proceedings against him accordingly," was an insufficient notice within the statute.

The act authorized trustees, upon complaint of any inhabitant, and "due investigation," to order "any pigstye, necessary, or nuisance," in or near the streets, &c., to be removed within seven days after notice in writing to the occupier of the premises wherein such nuisance was situated. The trustees issued such a notice to the plaintiff, imputing that he kept a brothel, and ordering him to discontinue such nuisance. Plaintiff thereupon brought an action, as for a libel, against the clerk who signed the notice: Held, that he was entitled to notice of action under the above clause, although it did not appear that there had been either complaint or investigation before the issuing of the order.

Semble, a brothel is a nuisance within the meaning of such an enactment, per Lord Denman. C. J., at Nisi Prius.

CASE for a libel, imputing to plaintiff that he kept a disorderly house, to the common nuisance, &c. Plea: Not Guilty, (by statute.)

The cause was tried at the sittings in Middlesex after last Easter term, before the lord chief justice. The alleged libel was contained in a notice, signed by defendant as clerk of the trustees under stat. 50 G. 3, c. cxlix. (local and personal, public,) for lighting, watching, &c., the streets in the parish of St. Luke, Middlesex, and left at the plaintiff's dwelling-house. It purported to be a notice under sect. 105 (a) of the statute, reciting a complaint to the trustees against plaintiff for keeping a brothel frequented by persons of ill fame of both sexes; and requiring him forthwith to abate and discontinue such nuisance, otherwise that the trustees would proceed to cause him to be indicted, in pursuance of the statutes in that behalf. More than thirty days before the commencement of the action, plaintiff's attorney wrote the following letter to defendant.

35 Castle Street, Holborn, 4th August, 1838.

Sir,—I am directed by Mr. John Norris of P. Street, to request you will forthwith give up the names of the person or persons said to have made a complaint to the trustees for lighting, &c., the parish of St. Luke, and upon which you did, on the 23d July last, serve Mr. Norris with a notice charging him with keeping a disorderly house, &c.; and,

(a) Sect. 105 is as follows: "In case, in any part or parts of the said parish, any hogstye, necessary-house, or nuisance shall be in or near any of the streets, squares, ways, roads, lanes, courts, passages, or public places within the said parish, it shall be lawful for the said trustees, upon complaint thereof to them made by any such inhabitant, and after due investigation of such complaint, by notice in writing under the hand or hands of their clerk or clerks for the time being, to order that any and every nuisance or nuisances, offence or offences, shall be forthwith remedied or removed, and if the same shall not be remedied or removed within seven days after such notice given to the owner or owners, occupier or occupiers, of the premises wherein such nuisances shall be situated, or left for him or them at his or their last or usual place or places of abode, it shall and may be lawful to and for the said trustees to indict, or cause to be indicted such person or persons so neglecting or disobeying such notice or notices, at the next general or quarter sessions of the peace for the county of Middlesex, for such nuisance or nuisances; and such person or persons being found guilty thereof, such nuisance or nuisances shall or may be removed, taken down, and abated, according to law with regard to public or common nuisances." There is a similar provision in the Metropolis Paving Act, 57 G. 3, c. xxix. s. 67, (local and personal, public,) which was also relied upon by the trustees, but of which no notice was taken in the argument.

unless you do, Mr. Norris will consider you the author of such notice, (which I conceive to be libellous,) and will take proceedings against you accordingly. Probably you will favour me with the names of the gentlemen, said to be trustees, who, in your company and presence, forcibly entered Mr. Norris's house. An answer is requested.

I am, sir, W. H.

To this letter defendant returned for answer that he would "be happy to receive any proceedings" which plaintiff might be advised to take against him, but declined to give the names, alleging that he did not know who they were, and, if he did, would not communicate their names. No complaint to, nor investigation by the trustees, previous to the above notice, was proved on the part of defendant. It was objected that a notice, issued under the above circumstances, was not actionable; and that no notice of action had been given as required by the statute. (a) On the other side, it was contended that the act did not apply to nuisances of the kind mentioned in the supposed libel: that the letter of plaintiff's attorney was a sufficient notice; and that there was strong evidence of want of bona fides in the proceeding of the trustees. The lord chief justice was of opinion that the statute applied to nuisances of this kind, and directed the jury to find for the defendant on the ground that there was no sufficient notice of action, with liberty to move to enter a verdict for plaintiff, with nominal damages.

(a) *Beechey v. Sides*, 9 B. & C. 806, was cited. See *Lidster v. Borrow*, 9 A. & E. 654, and the cases there cited. The following sections of the act were referred to.

Sect. 170. "No plaintiff or plaintiffs shall recover in any action to be commenced against any person or persons for any thing done in pursuance of this act, unless *notice in writing of such intended action* shall have been given to the clerk or clerks of the said trustees, or left at his or their last or usual place or places of abode, twenty-one days before such action shall be commenced, *signed by the attorney for the intended plaintiff or plaintiffs, specifying the cause or causes of such action*; nor shall any plaintiff or plaintiffs recover in such action for satisfaction for special damage or otherwise, or for any such irregularity, trespass, or other proceedings, if tender of sufficient amends shall be made by or on the behalf of the party or parties who shall have committed, or cause to be committed, every or any such irregularity, trespass, or wrongful proceeding, before such action shall be brought," &c.

Sect. 173. "No action or suit shall be commenced against any person or persons for any thing done in pursuance of this act, until after *thirty days' notice* in writing shall be thereof given to the clerk or clerks to the said trustees, or after sufficient satisfaction made or tendered, or after six calendar months next after the fact committed, for which such action or actions, suit or suits, shall be so brought; and all such actions or suits shall be laid and tried in the county of Middlesex, or city of London, and not in any other county, city, or place; and that the defendant or defendants in such action or actions, suit and suits, and every of them, may plead the general issue, and give this act, and the special matter, in evidence, at any trial or trials which shall be had thereupon; and that the matter or thing for or on which such action or actions, suit or suits, shall be brought, was done in pursuance, and by the authority, of this act; and if the said matter or thing shall appear to have been so done, or if it shall appear that such action or suit was brought before *twenty-one days' notice* was given as before directed, or that sufficient satisfaction was made or tendered or paid into court as aforesaid, or if any such action or suit shall not be commenced within the time before for that purpose limited, or shall be laid in any other county, city, or place than as aforesaid, then the jury shall find for the defendant or defendants therein; and if a verdict shall be found for such defendant or defendants, or if the plaintiff or plaintiffs in such action or actions, suit or suits, shall become nonsuited, or suffer a discontinuance of such action or actions, suit or suits, or if upon a demurrer or demurrers in such action or actions, suit or suits, judgment shall be given for the defendant or defendants therein; then, in either of the cases aforesaid, such defendant or defendants shall have treble costs, and shall have such remedy and remedies for recovering the same, as any defendant or defendants may have for the recovery of his, her, or their costs in other cases by law."

Whether twenty-one, or thirty days' notice was necessary, was a question which the Court adverted to, but found it unnecessary to determine.

Erle now moved to enter a verdict for the plaintiff. The defendant, who relies on the order of the trustees, must stand in their place, and cannot justify, because they could not have justified. There was no complaint, nor any investigation by them before they issued the notice. [Lord DENMAN, C. J. I held, that the order, though it might be irregular, was, at all events, sufficient to entitle the defendant to notice of action.] The letter by the plaintiff's attorney on 4th August, was a sufficient notice. The act does not require such particularity in the notice as stat. 24 G. 2, c. 44, s. 1, does in the case of justices, but merely a general notice of action.

LITLEDALE, J. The notice required is certainly not so particular as is necessary in proceeding against magistrates; but this notice is insufficient. In *Lewis v. Smith*, Holt, N. P. C. 27, (3 E. C. L. R. 13,) a letter, notifying the party's intention "to take legal measures" if certain goods were not delivered forthwith, was held insufficient by C. J. GIBBS, under a similar provision. The refusal to give up the names should have been followed by a distinct notice of action, to which the defendant, who stands in the situation of the trustees in this respect, is clearly entitled, where the act complained of was done *bonâ fide*.

PATTESON, J. The order issued by the trustees, professed to be a proceeding under the act; and there is enough to show that it was taken *bonâ fide*, in pursuance of the act. The defendant was, therefore, entitled to a proper notice. Here the letter was sent without reference to the statute. It is only a conditional notice, not an absolute one; and it makes no allusion to the period of time at the end of which an action is to be commenced, and during which the defendant is to have an opportunity of tendering amends.

WILLIAMS, J. The question is, not whether the defendant and the trustees were strictly justified by the provisions of the statute, but whether there was a semblance of acting under it. If there was, the defendant is entitled to such a notice as will induce him to tender amends, where the act has not been strictly pursued.

Lord DENMAN, C. J., concurred.

Rule refused.

OWSTON against COATES.—p. 193.

The sureties given by a trader under sect. 8, of stat. 1 & 2 Vict. c. 110, (for abolition of arrest on mesne process,) may discharge themselves by a tender of their principal after verdict against him, and before judgment.

IN Easter term last, *Cresswell* obtained a rule nisi that defendant should be at liberty to render himself in discharge of his sureties, given under 1 & 2 Vict. c. 110, s. 8, (a) and that, in the mean time, proceedings should be stayed.

The following facts appeared on affidavit. Defendant, being arrested on a *capias*, put in bail, July, 1838. On 3d December, an exoneretur was entered under the seventh section of the above act. On 8th December, plaintiff served defendant with a copy of affidavit and notice in writing, agreeably to the statute, requiring the payment of 4000*l.*, the amount for which he had been arrested; whereupon defendant procured two sureties to join him in a bond, of which the following was the condition. "If the above bounden Thomas Coates shall pay such sum or sums of money as shall be recovered in the said action so brought by the said company in the name of the said Thomas Owston, as such trustee as aforesaid, against the above bounden Thomas Coates, for the recovery of the said alleged debt, together with such costs as shall be given in the same, or shall render himself to the custody of the marshal of the marshalsea of the Court of Queen's Bench, being the jailor of the Court in which the said action hath been brought, and is now depending as aforesaid, according to the practice of such Court, or within such time and in such manner as the said Court, or any judge thereof shall direct, after judgment shall have been recovered in such action, then the present obligation shall be void," &c. At the following Spring assizes, plaintiff obtained a verdict for 2500*l.*, on which judgment had not been entered up. Defendant, having become a bankrupt, and being desirous of relieving his sureties, then applied to a judge at chambers for leave to put in bail, that he might render "according to the practice of the Court;" but his lordship, being of opinion that it could not be done under the act till after judgment, refused to allow it; upon which the present motion was made. In last Easter term, (b)

(a) Sect. 8 enacts, that if a creditor of a trader (to a certain amount) shall file an affidavit in the Court of Bankruptcy, that his debt is justly due, and that his debtor is a trader, and shall serve him personally with a copy, and with notice in writing requiring immediate payment, "and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same, to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the jailor of the Court in which such action shall have been or may be brought, according to the practice of such Court, or within such time and in such manner as the said Court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."

(b) Wednesday, 8th May, 1839. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

Joseph Addison showed cause. The only render known to the practice of the Court is by bail; and that alone must have been in the contemplation of the act. Sect. 3, &c., shows that all arrest on mesne process is not taken away. The cases in which the Court gives time for render by bail account for the words used in sect. 8; *Glendining v. Robinson*, 1 Taunt. 320; *Winstanley v. Gaitskell*, 16 East, 389. Bail alone can render, in which respect bail differs from mainprize: *Bac. Ab. Bail in Civil Causes*, vol. i. page 441, (7th ed.); where an Anonymous case, 6 Mod. 231, and 4 Inst. 180, are cited. Even if the defendant were rendered, the marshal would have no power to keep him; for he will not be in custody under any writ, and, the exoneretur being entered, it is as if there had never been bail. The case is analogous to that of bail in error, who cannot render; or to the old provisions for proceeding against debtors being members of parliament, especially the repealed stat. 4 G. 3, c. 33; except that there is, in the act last mentioned, no alternative to pay or render, as in stat. 1 & 2 Vict. c. 110, s. 8. The intention of the act was to give the power only where the existing practice of the Court recognises it. At all events the sureties can have no relief till after judgment, by the express words of the clause.

Cresswell, contra. The sureties are not like mainpernors, nor like sureties in bankruptcy, who are in the nature of mainpernors, and give security to pay but not to render; stat. 6 G. 4, c. 16, s. 10. The analogy is rather to the recognisance given on reversing outlawry. If there be no subsisting practice by which the render can be effected, the Court must now establish it; otherwise the party cannot do that which, it is evident, the legislature meant to be done. The right to establish, alter, or suspend general rules of practice, is constantly exercised. If the Court has no power according to its present practice, it may, under the latter part of the clause, direct now, when and how the render shall be made after judgment. [PATTERSON, J. You apply the words "after judgment" to the time of render, and not to the time of making the rule.]

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court. This was a motion by persons, who had given bond under the eighth section of stat. 1 & 2 Vict. c. 110, to be allowed to render their principal after verdict against him and before judgment. The condition of the bond as required by the act, is to pay the condemnation money or render the defendant according to the practice of the Court. Now, the practice of the Court, as to render, applies only to cases when a defendant is at large upon bail, and, when rendered, the defendant is in custody under the writ upon which he was originally taken. In the present case there is no such writ, nor any bail; but we think that, in order to give effect to the act of parliament, we must construe it to have placed the defendant, who has found sureties by bond under the eighth section, in the same situation as if he had been arrested and given bail, and to have treated the obligors in the bond as bail in the action.

The rule of Court for the render, or order of a judge for the same purpose, will then be sufficient authority, by virtue of the eighth section of the act, for the detention; and the obvious intention of the legislature will be carried into effect.

Some doubt existed as to the words "after judgment" in the eighth

section, namely, whether they apply to the whole preceding matter or not : as to which we think that, at all events, they do not apply to a render "according to the practice of such Court ;" and as bail would, by that practice, have been at liberty to render a defendant after verdict and before judgment, we think that the obligors in this bond must be at liberty to do the same. The rule, therefore, will be made absolute. Rule absolute.

DOE on the demise of OXENDEN against CROPPER. 197.

An ejectment, brought for close A. and close B., was referred at Nisi Prius to an arbitrator, together with an action for trespass upon close B., brought by the lessor of the plaintiff against the same defendant. In the action of trespass there were special pleas justifying on the ground of title to close B. in defendant. The arbitrator ordered a verdict on all the issues in trespass for the defendant, except one issue on a plea of Not Guilty ; but he ordered a general verdict for the plaintiff in the ejectment. By a paper which he delivered with the award, stating his reasons, it appeared that he considered that the lessor of the plaintiff had no title to close B.

Held that, though there appeared a repugnancy, the *postea* in the ejectment could not be amended by confining it to close A., and that the lessor of the plaintiff was entitled to retain the general verdict.

From the affidavits in this case it appeared that the ejectment was brought to recover a close called Little Becks, and also the house and land which were the subject of the two following agreements, and for no other lands, &c.

By memorandum of agreement, dated July 8th, 1831, between Cropper and Oxenden, Cropper agreed to let, and Oxenden to take, at a certain rent, the house and land therein mentioned, for three years from 13th May, then last, with liberty to Oxenden to continue the possession for five or seven years, on stating his determination so to do, in writing, six months before the expiration of the three years. By memorandum of agreement, dated May 14th, 1832, between the same parties, Cropper agreed to sell and Oxenden to purchase the same house and land at a price named.

Little Becks formed no part of the property mentioned in the two agreements, but had been let by Cropper to Oxenden in May, 1833. Cropper retook possession of Little Becks about March, 1834 : and Oxenden having failed to complete the purchase contracted for by the agreement of May, 1832, Cropper also entered into possession of the house and land which was the subject of that agreement, in February, 1835.

For the entry in February, 1835, Oxenden brought an action of trespass against Cropper ; but, in that action, no claim whatever was made respecting Little Becks. Cropper pleaded several pleas of soil and freehold, as to the house and land, in himself and others ; and, as to certain property therein, he pleaded property in himself and others ; and also, to the whole declaration, Not Guilty. Oxenden replied, to the pleas of soil and freehold, a demise to him by Cropper of 14th November, 1832, traversed the pleas of property, and joined issue on the plea of Not Guilty. Cropper traversed the demise, and joined issue on the traverse in the replication : and Oxenden joined issue on the traverse in the rejoinder.

The actions of ejectment and trespass came on to be tried at the Lincolnshire Summer assizes, 1837, before PARK, J. ; when, by an

order of *Nisi Prius*, it was ordered by consent, &c., that a juror should be withdrawn in the ejectment, and a verdict be entered for the plaintiff in *Oxenden v. Cropper* (the action of trespass) for 1000*l.* damages, subject to the award of a barrister, who should be at liberty to order and direct for whom and for what sum the verdict should be finally entered, and to direct a verdict to be entered in the ejectment as he might think right; and he was to settle all matters in difference between the said parties in both causes, and to order and determine what he should think fit to be done by either party respecting the matters in dispute, who agreed to be bound and concluded by such determination; the costs of each cause to abide the event of the award, and the costs of the reference and all other costs to be in the discretion of the arbitrator. And, by the like consent, the defendant was, at all events, to retain possession of the premises in question, and Oxenden was to release all right and interest therein that he might have: and the arbitrator was to say what compensation, if any, was to be paid by the defendant to Oxenden in respect of any money he might have expended upon the premises agreed to be purchased by Oxenden of defendant.

The arbitrator made his award, the material part of which is as follows. "I do award," &c., "that a verdict be entered in the said first-mentioned cause, that is to say, in the action of ejectment, for the plaintiff, with 1*s.* damages; and I do further award," &c., "that upon all the issues joined in the said last-mentioned cause, that is to say, the action of trespass, except the issues joined on the last plea in the said last-mentioned cause, the verdict be finally entered for the defendant; and that, upon the issue joined on the said last plea, that is to say, the plea of Not Guilty, the verdict be finally entered for the plaintiff. And I," "having duly heard and considered the claims made by the said Henry Chudleigh Oxenden upon the reference of all matters in difference, and particularly the claim made by him to compensation for money expended by him upon the above-mentioned premises at Laceyby," (the subject of the agreement to purchase,) "and also the claims made by the said Robert Cropper against the said Henry Chudleigh Oxenden, upon the reference of all matters in difference between the said last-mentioned parties," "do award," &c., "that nothing shall be paid by either of the said last-mentioned parties to the other of them in respect of such claims."

At the time of the award being taken up by the defendant, the arbitrator delivered to him a paper writing, of which the material part is as follows. "If either party should desire to know the grounds upon which I have proceeded in making my award, they are as follows. I am of opinion that, if, previous to the expiration of the agreement for three years in May, 1834, the contract for the purchase had been put an end to, the parties, according to the doctrine in *Doe dem. Gray v. Stanion*, 1 Mee. & W. 695; S. C. Tyrwh. & Gr. 1065, would have been remitted to their original rights, and the tenancy would have revived and have continued until the expiration of the agreement; but that, when the agreement expired, nothing occurred upon which a new contract upon the terms of the old one for a tenancy from year to year could be implied. It was, I think, clear that neither party contemplated a tenancy from year to year from that time; and that Mr. Oxenden was permitted to continue in possession of the premises mentioned in the declaration in trespass solely on the footing of the proposed purchase; and that he was in the same

situation as if he had then taken possession under the purchase contract. With respect to the Little Becks, I think there was fully sufficient evidence of a tenancy from year to year, not determined by notice at the time the possession was resumed by the defendant; and that, consequently, *the ejectment might be maintained to recover the Little Becks*. I am of opinion that the purchase did not go off from any defect of title in, or default of, the defendant, but in consequence of the inability of the plaintiff to complete the purchase: and, under such circumstances, I am not aware of any rule of law or equity by which the defendant could be required to pay back money laid out upon the premises without his consent or privy." He then added other reasons, not material here, for his not allowing the expense of the improvement. It was deposed that the only points in dispute before the arbitrator, in the ejectment, were, whether the tenancy of Little Becks was from year to year, and whether it continued on the day of the demise, 4th February, 1835, and whether Oxenden was tenant from year to year, or at will or sufferance, under the two agreements or otherwise.

The *postea* in the action of ejectment was entered Guilty, generally.

Whitehurst, on affidavit of the above facts, now moved that the *postea* might be amended by confining it to Little Becks. (a) It is clear that the arbitrator considered the defendant entitled to the possession of all but Little Becks, both from the award as to the action of trespass, and from the language of the document which he delivered with the award. In ordinary cases of verdict, the Court has power to amend the *postea* according to the true intent of the jury: and, though this is usually done by the judge who tries the cause, yet, strictly speaking, he is only a commissioner; and the real power is in the Court. Then the same rule must be applied to cases where the *postea* is the result of an award. In *Kent v. Elstob*, 3 East, 13, the Court, discovering, from a paper delivered by the arbitrator, as here, together with the award, that he had mistaken the law, set the award aside. *Sharman v. Bell*, 5 M. & S. 504, may be cited for a contrary doctrine: but there the grounds of the arbitrator's decision were collected only from his conduct on the arbitration. But in a very late case, *Jones v. Corry*, 5 New Ca. 187, where an arbitrator had stated his reasons verbally, after the publication of the award, in order to enable the parties to apply to the Court, the Court, considering the reasons bad, set aside the award. A notion at one time prevailed that a plaintiff in ejectment, if he proved his case for any part of the land, was entitled to a general verdict, though, at his own risk, he was bound to confine the execution to the part for which he had proved. [Lord DENMAN, C. J. A general verdict does not bind for all claimed: but, where the evidence confines the case to a part, the verdict may be for such part.] In *Doe dem. Errington v. Errington*, 4 Dowl. P. C. 602, COLERIDGE, J., said, "The action of ejectment in form complains of an unlawful ouster, usually from several messuages or closes, and the plea of not guilty puts in issue an ouster from any one of them. The issue, therefore, is formally and substantially divisible. It is very possible, that as to one or two messuages the ouster may be unlawful, and as to the residue lawful, and

(a) He also moved that the master should tax the costs for the defendant, or at any rate no for the plaintiff, as to all except Little Becks, but, it not appearing that any taxation had hitherto taken place, the Court said that they could not presume that the costs would be taxed erroneously; and that the motion was therefore so far premature.

there is nothing to prevent a finding by the jury of such an ouster as to some or one of the messuages or closes, and negating it as to the residue." Here the question is very important as affecting the costs.

Humfrey showed cause in the first instance. The arbitration rule gives the defendant the possession, at all events; so that nothing can be affected except the costs. *Doe dem. Bryant v. Whipple*, 1 Esp. 360, shows that, under a demise of the whole, an undivided moiety may be recovered. Here the award, if objectionable at all, must be so on the ground of repugnancy. [He was then stopped by the Court.]

Lord DENMAN, C. J. There is an apparent repugnancy, on looking at the matters now brought before the Court; but you have a general verdict, and are entitled to keep it.

LITLEDAL, PATTESON, and WILLIAMS, Js., concurred.

Rule refused.

HALL against BUTLER and Another.—p. 204.

N., having no title to certain premises, let them by parol, and received rent. Afterwards another claimant, B., demanded the rent; and N., being satisfied with B.'s title, informed his tenant, in B.'s presence, that he had given up the premises to B., who was now the landlord, and that the rent was thenceforth to be paid to B. The tenant acquiesced; and, when B. demanded the next quarter's rent, paid part of it on account. Held, that the tenant could not afterwards set up the title of a third claimant who had demanded rent, but had taken no step to eject him; no deception by any of the parties having been suggested.

REFLEVIN. Avowry for rent due from plaintiff as tenant to defendant, Butler. Plea, non tenuit.

On the trial before the recorder of Chester, the defendants proved a will of Joseph Butler, (whose heir, defendant Butler was,) dated 8th August, 1783, by which he devised the premises in fee to his daughter Elizabeth, who afterwards married one Nevitt, and died in 1828, without having had issue. Nevitt continued to receive the rent after his wife's death; and plaintiff entered at Lady-day, 1834, under a yearly tenancy by a written demise from him not under seal. At Christmas following, Nevitt received the rent. After this, and before the next Lady-day, defendant Butler laid claim to the premises as heir at law of Mrs. Nevitt, deceased, and demanded rent of plaintiff. Whereupon, plaintiff went with him to Nevitt, and was then informed by Nevitt, that he had given up the premises to defendant Butler, who was now to be his landlord; and that the rent was thenceforward to be paid to defendant Butler. Plaintiff acquiesced in this; and, when the rent was due at Lady-day, 1835, paid to defendant Butler, 6s. 6d., on account. Plaintiff afterwards, and before further payment by him, received notice from another claimant, Daniel Butler, to pay rent to him, and thereupon refused to pay it to anybody until the dispute was settled. Defendants then distrained on plaintiff. At the trial, the plaintiff offered in evidence, a deed of settlement prior to the will of 1783, to show that the premises in question were leasehold; that Daniel Butler was entitled to a share of them under that settlement; and that the defendant Butler, never had any title. The recorder directed the jury to find a verdict for defendants, giving leave to move to enter a verdict for the plaintiff, or for a new trial. *Townsend* obtained a rule accordingly.

W. H. Watson now showed cause. Nevitt, not being tenant by the curtesy, had no title whatever after his wife's death; and he and his tenant might have been ejected forthwith. Being satisfied with the title of the defendant Butler, he authorized his tenant to become the tenant of the defendant. The legal effect of this was either an adoption by the defendant Butler of Nevitt's demise to the plaintiff, whereby the plaintiff became the tenant of the defendant ab initio; or a fresh demise by the defendant to the plaintiff upon the disclaimer of Nevitt. In either case, the plaintiff cannot now dispute the defendant's title. This is not a mere attornment under mistake, as in *Cornish v. Searell*, 8 B. & C. 471, (15 E. C. L. R. 267,) where the attornment was to sequestrators who had, in fact, no legal title. The case differs from those in which the tenant's possession was originally a lawful one, and where the only question was, to whom the rent was to be paid.

Townsend, contrà. The plaintiff was induced to attorn to the defendant Butler, by Nevitt's misrepresentation. It was, therefore, an attornment in ignorance of the real title, which was in Daniel, and not in the defendant. The distinction between receiving possession from one who has no title, and merely attorning by mistake to such a person, is noticed by BAYLEY, J., in *Cornish v. Searell*, 8 B. & C. 475, (15 E. C. L. R. 267,) which is quite in point. The defendant Butler does not claim under Nevitt; but Nevitt disclaims his own title as landlord, and represents the defendant as the party justly entitled. The defendant attorns upon the faith of that statement, which turns out to have been incorrect. Under such circumstances, the tenant may call in question the defendant's title; *Rogers v. Pitcher*, 6 Taunt. 202, (1 E. C. L. R. 355;) *Fenner v. Duplock*, 2 Bing. 10, (9 E. C. L. R. 294;) *Gregory v. Doidge*, 3 Bing. 474, (13 E. C. L. R. 53;) *Hopcraft v. Keys*, 9 Bing. 613, (23 E. C. L. R. 399;) *Doe dem. Plevin v. Brown*, 7 A. & E. 447, (34 E. C. L. R. 140.) The last case is very much like the present. If, then, proof of the real title is admissible, it disproves the tenancy under the defendant Butler, and is evidence on the issue of non tenuit.

LORD DENMAN, C. J. Nevitt, who let the plaintiff into possession, and whom the plaintiff was therefore bound to acknowledge as his landlord, informs him that the premises belong to the defendant Butler, and that the rent is to be thenceforward paid to the latter, who demands it accordingly, and receives part of it. This is either a ratification of the demise by Butler, or is a fresh demise by him. In either case the same consequence follows; viz.: that the title of the defendant Butler, cannot be disputed by the tenant. As no deception or misrepresentation was intended by Nevitt, or by the defendant Butler, the case falls within the ordinary rule.

LITLEDALE, J. I entertain some doubts on the case; but on the whole it seems to fall within the rule. The legal effect of the arrangement is, that the plaintiff may be considered as having become tenant to the defendant Butler, under a fresh taking from Christmas: and the avowry is therefore proved.

PATTESON, J. There is a distinction between disputing the title of one who has actually let the party into possession, and of one who, afterwards, claims to be entitled. In the latter case, the tenant may generally dispute it by showing title in another. Here the effect of the arrangement in 1834, is rather a question of fact than of law. I am not sure that it may not be considered as an original taking from Butler

himself; for Nevitt treats himself as the agent of Butler, who adopts the demise. But, at all events, Nevitt disclaims title in himself, and points out Butler as the real landlord; the plaintiff acquiesces, and consents to the new holding; and there is no evidence of any attempt to eject him by the party whose title he now attempts to set up.

WILLIAMS, J., concurred.

Rule discharged.

YORKE against CHAPMAN.—p. 207.

The summary remedy given by stats. 2 G. 2, c. 22, s. 6, and 32 G. 2, c. 28, s. 11, to a prisoner for an abuse committed by a jailer, &c., in his office, is cumulative: therefore the Court will not stay proceedings in an action of trespass commenced by a prisoner for such abuse. But s^emble, if the prisoner resorts to his summary remedy, and obtains the decision of the Court thereon, he will not be permitted afterwards to bring an action for the same cause.

In last Hilary term, Sir *John Campbell*, Attorney-General, had obtained a rule nisi to stay proceedings in the above action, on an affidavit of the following facts.

Defendant, who was marshal of the Queen's Bench prison, had, in the Spring of 1837, confined plaintiff, then being a prisoner for debt, in the strong room of the prison for one month, under R. E. 6 G. 4.(a) The misconduct of the plaintiff consisted in molesting and abusing the prison watchmen in the execution of their duty. In January 1838, an action of assault and false imprisonment was commenced by plaintiff against defendant; and the declaration was filed 21st January last. No petition had been delivered by plaintiff to this Court, or any of its Judges, complaining of the alleged grievance. The plaintiff's affidavit denied the misconduct imputed to him, and also charged the defendant with refusing to hear evidence in disproof of it.

Platt now showed cause. There is no precedent for such an application; nor adequate remedy for the plaintiff, if it is granted. The defendant's condition would be better than that of a justice of the peace. The statutes, which give a right of petition to this Court, are remedial and for the benefit of prisoners, and do not deprive them of their common law remedies.

Sir *John Campbell*, Attorney-General, contra. There is no precedent for such an action by a prisoner, and therefore none for this application. The Court is only required to enforce the existing law by confining the plaintiff to his proper remedy. There are two acts of parliament in point, viz. 2 G. 2, c. 22, s. 6, and 32 G. 2, c. 28, ss. 6, 11. By virtue of these, and of the rules of this Court, made in pursuance of them. viz., R. M. 3 G. 2,(b) R. H. 59 G. 3,(c) and R. E. 6 G. 4,(d) the marshal has

(a) By which it is ordered that, if any prisoners (besides other offences mentioned) shall be guilty of behaving themselves in a riotous or disorderly manner in the prison, it shall be lawful for the marshal to confine such prisoners in such of the strong rooms of the prison as the marshal shall think fit, and for such time as the marshal shall adjudge and think adequate to the offence, not exceeding one calendar month for the first offence, and three calendar months for the second.

(b) Which limits the marshal's power of confinement, and gives an appeal to the court, or a judge in vacation. Rules, orders, &c., in the Court of King's Bench, (2d ed. 1747.)

(c) Which directs the marshal, and his officers, to present petitions of prisoners, complaining of grievances, to the court or a judge in vacation.

(d) See p. 207, note (a).

power to confine in the strong room for certain offences; and this Court, or any of its Judges, have ample power to punish and to award reparation and costs upon the petition of a prisoner complaining of abuse. The grievance is at most only a confinement in one room instead of another; and there is no charge of excess. It will be of serious consequence if prisoners, avowedly insolvent, are to be at liberty to harass their gaoler with actions, where a specific and easy remedy has been provided for them. No delay can be attributed to the defendant, who has applied as soon as possible after the filing of the declaration.

Cur. adv. vult.

On a subsequent day in this term (Wednesday, 12th June) the judgment of the Court was delivered by

Lord DENMAN, C. J. This was a motion to stay proceedings in an action of trespass brought against the marshal of the Queen's Bench prison, for confining the plaintiff in the strong room. By statutes 2 G. 2, c. 22, and 32 G. 2, c. 28, and by Rules of Court founded on those statutes in M. 3 G. 2, (a) H. 59 G. 3, (b) and E. 6 G. 4, (c) power is given to the marshal to imprison in the strong room any of the debtors in his custody who are proved to have been guilty of certain offences. And by the same statutes and rules, for the more speedy correction of abuses, the courts and judges are empowered and required to hear complaints against the keepers of prisons in a summary manner, and award the party complaining, if injured, recompense and costs. But the statutes contain no restrictive words, forbidding any action at law in such cases, or enabling the courts to stay any actions.

The provision for recompense by summary complaint appears plainly to be cumulative, and not to take away the right of any party who may conceive himself aggrieved to bring an action for redress. If, indeed, he has recourse to the summary remedy, and obtains a recompense, and afterwards brings an action, the Court would interfere, as is suggested by Lord MANSFIELD in *Cameron v. Reynolds*, 1 Cowp. 403; and probably a decision against him, on a summary application, might have the same effect. But we think that he is not compellable to resort to such remedy; and, in the absence of any authority for such an interference, we think that the Court has no power to stay the present proceedings. The rule must therefore be discharged.

Rule discharged.

(a) See p. 208, note (a).

(b) See p. 208, note (b).

(c) See p. 207, note (a).

WHITEHEAD against TAYLOR.—p. 210.

A cognisance by defendant as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor.

REPLEVIN. Cognisance by defendant as bailiff of Mary H., executrix of John H., for a year's rent due in the lifetime of John H., in respect of premises held and enjoyed by plaintiff as tenant to the said John, the plaintiff continuing in possession thereof under the demise after the death of the said John, until, at, and after, the said time when, &c. Profert of letters testamentary. Plea, that defendant, at the said

time when, &c., was not the bailiff of Mary H., in manner and form, &c. Issue thereon.

On the trial of the cause before Lord DENMAN, C. J., at the Middlesex sittings after Easter term, it appeared that the defendant, a broker, was directed by the testator to distrain on the plaintiff; that the testator died just before the distress was taken; and that the executrix neither withdrew the distress, nor gave any fresh authority to distrain, but recognised and adopted it. His lordship directed a verdict for the defendant, giving liberty to move to enter it for the plaintiff.

Jervis now moved in pursuance of the liberty reserved. The death of the testator revoked the authority of the defendant. At the time of distress he was the bailiff, not of the executrix, but of the testator. Having distrained in one name, he cannot now avow in the name of another, though he might have distrained and avowed for different things. It is true that if a distress is taken in the name, but without the authority, of a stranger, the latter may ratify the agency and make it good ab initio. But here the defendant was properly authorized to distrain by one whose authority was afterwards revoked by death. The tenant can look only at the authority in force at the time when the distress is made. Finding it to be a defective one, he must replevy; otherwise his property may be sold, and yet the rent remain unsatisfied. Having replevied, he is bound to prosecute his suit. Under such circumstances it would be unjust that the subsequent ratification of a third party, not entitled at the time of the distress, should be set up to defeat the action. Besides, the executrix, whose power both of action and distress is given by stat. 32 H. 8, c. 37, s. 1, (a) can support neither the one or the other before probate; and therefore cannot ratify a distress made before probate.

Cur. adv. vult.

On a subsequent day in this term, (Wednesday, 12th June,) judgment was given by

Lord DENMAN, C. J. [After stating the pleadings, his lordship proceeded.] The evidence showed that the testator had given the defendant authority to distrain, but died almost immediately, before the distress was taken. After it had been taken in the testator's name, the executrix fully recognised and adopted the defendant's act of distraining. It was objected that, by the testator's death, the authority was revoked; that the executrix had no power to distrain before probate, because she could not maintain an action for the rent at that time; and that the distress, being made in the name of one whose authority had expired with his life, could not be ratified by his executrix afterwards.

We are of opinion that both these objections are removed by the principle of relation.

1. The rent was due to the estate; and the law knows no interval between the testator's death and the vesting of the right in his representative. As soon as he obtains probate, his right is considered as accruing from that period. If an action, indeed, be brought in that interval, he cannot proceed to declare, because he must make profert of the letters testamentary in his declaration; but that reason does not apply to a distress, or any other act performed in assertion of his right as executor. (b)

(a) See new stat. 3 & 4 W. 4, c. 42, s. 37. 2 Williams on Executors, 669, (ed. 2.) Part III. Book I. ch. i.

(b) See Williams on Executors, 172, &c., (ed. 2.) Pt. I. Bk. IV. Ch. i. § 2.

The executrix could ratify the act of the defendant, as testator's bailiff, though his authority was at an end; for she might have ratified the act of an entire stranger, as appears by the decision of ANDERSON, C. J., in which Periam concurred, in an Anonymous case in Godbolt's Reports, p. 109, cited in 4 Vin. Abr. 1, *Bailiff*, (D,) pl. 7. Such ratification has been held to legalize a past act, even when given after action brought. We, therefore, think that there ought to be no rule.

Rule refused.

BASTARD against SMITH and Others.—p. 213.

The expense of a witness at Nisi Prius to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for, and obtaining copies and translations of, such records to be used in evidence, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them.

The costs of the attendance of an officer of the Court of Chancery, to produce affidavits filed there, for the purpose of using them at a trial to check the testimony of the same deponents at Nisi Prius, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them.

ERLE obtained a rule in Trinity term, 1838, to show cause why the master should not review his taxation of the plaintiff's bill of costs in this cause. The principal exceptions to the taxation were that he had allowed the following items with respect to two of the plaintiff's witnesses, namely, Samuel Anderson, the registrar of affidavits in Chancery, and Charles Devon, of the Chapter House, Westminster, a gentleman conversant with ancient records.

	£	s.	d.
Subpœna duces tecum for Samuel Anderson, the registrar of affidavits in Chancery, to produce the affidavits filed in the Court of Chancery, and fee	-	-	0 10 0
Copy thereof to serve on him, fo. 10.	-	-	0 3 4
Service of subpœna on him in London	-	-	0 5 0
Paid his travelling expenses to and from Exeter, 176 miles	8	16	0
Paid him for his attendance at the assizes seven days, at 2 <i>l</i> .			
2 <i>s</i> . per day	-	-	14 14 0
Service of subpœna on Mr. Charles Devon, in London	-	0	5 0
Paid his travelling expenses to and from Exeter, 176 miles (say half in this case)	-	-	4 8 0
Paid him for his attendance at the assizes ten days, five days at 1 <i>l</i> . 11 <i>s</i> . 6 <i>d</i> ., and five days at 3 <i>l</i> . 3 <i>s</i> . per day (a)	-	-	23 12 6

The master had further allowed a payment to Devon of 93*l*. 8*s*. 11*d*. for making searches for, obtaining office copies of, and translating, records intended to be proved at the trial on the part of the plaintiff.

The affidavits mentioned above were affidavits sworn by certain witnesses in a suit in Chancery between the same parties and upon the same subject, who, it was expected, would be produced as witnesses for the defendants at the trial of this cause. An order was obtained from the lord chancellor for the production of these by Anderson; who accordingly attended the trial, solely for that purpose. The defendants had not been previously called upon to admit copies of them as directed by Reg. Gen. H. 4 W. 4, s. 20, 5 B. & Ad. xvii. They were carried down to the assizes by the plaintiff in order to check the

(a) See *Scerern v. Olive*, 3 B. & B. 72, (7 E. C. L. R. 352.)

testimony of the witnesses, and to enable counsel to cross-examine them; and they were actually used for that purpose on the trial; TINDAL, C. J., who tried the cause, having held that plaintiff's counsel had no right to cross-examine one of the witnesses on the contents of his own affidavit, and to use it afterwards, without putting the original into his hands to refresh his memory. (a)

With regard to the payment to the witness Devon, it was objected that his attendance was only for the purpose of proving and explaining copies and translations of ancient charters and documents of a public nature from repositories at the Tower, Rolls' Chapel, &c., which every one was supposed to know and understand; and that defendants had never been called upon to admit them agreeably to the rule of Court. They also objected that the expense of searching for documents was not properly an item of costs as between party and party, but between attorney and client.

On the part of the plaintiff it was stated, on affidavit, that the copies produced and proved by Devon were office copies of ancient records from the date of the Conquest down to that of Queen Elizabeth; that Devon was subpœnaed, not only to prove such copies, but also to translate and explain them, and to watch and explain, if necessary, the documents, and translations of documents, of very early date, offered in evidence by the defendants, on the meaning of which there was some difference of opinion; that the charge for searching and obtaining office copies was in respect of records which were actually found and intended to be used in the cause, and were material and necessary evidence for the plaintiff; and that the last item was objected to before the master only on the ground that it included charges of search for documents not found, or not intended to be used in the cause. It was also alleged that a book, relied upon by the defendants, called "Pearce's Stannary Laws," and which was actually offered in evidence at the trial and rejected by the judge, was inaccurate; and that one of the reasons for procuring the attendance of Devon was to prove such inaccuracy.

The issue in the action was on the existence of a custom for all tinners in Devonshire to divert water, and make leats through any land in the country for the use of tin mines.

Neither of the witnesses was in fact called; nor were any of the above documents offered in evidence on the part of the plaintiff, inasmuch as the defendants were permitted to begin on the trial, and the plaintiff obtained a verdict without producing any evidence. (b)

Sir John Campbell, Attorney General, and M. Smith now showed cause, on the part of the plaintiff. The rules on which the defendants rely are R. H. 2 W. 4, VI. and VII., 3 B. & Ad. 392; and Reg. Gen. H. 4 W. 4, s. 20, 5 B. & Ad. xvii.; but no one of them is applicable. With respect to the affidavits, mere copies, though admitted to be correct, would have been insufficient to enable the plaintiff to cross-examine upon their contents, as was held at the trial. The original could be produced only in the hands of the proper officer. (c) As to the other witness, he was subpœnaed, not solely to prove the accuracy of the copies, but also to translate and explain them, as well to watch the documentary evidence produced on the other side. He was called to give oral evidence, as an antiquary, upon the ancient records, and

(a) See *The Queen's Case*, 2 B. & B. 286, (6 E. C. L. R. 112.)

(b) See *Bastard v. Smith*, 2 Moo. & Rob. 129.

(c) See *Bentall v. Sidney*, ante, 84.

might have been asked as to the result of his examination of them; *Rowe v. Brenton*, 3 Man. & R. 212; S. C. (not S. P.) 8 B. & C. 737, (15 E. C. L. R. 335.) Besides, none of the rules apply to the case of a translation, which is, in fact, the oral evidence of the witness reduced to writing.

Erle, *contra*. The original affidavits were not necessary for the mere purpose of furnishing materials of examination. Copies would have been sufficient, except to fix the witness with perjury. (a) Then, as to the attendances and charges of Devon, the plaintiff cannot charge the defendants with precautionary measures, such as searching for evidence, and watching the proofs of the defendants. He was present as an adviser rather than a witness. [PATTESON, J. Would you disallow the expense of an interpreter?] The documents were all of a public nature, of which the defendants would have admitted copies, and which all people, or at least the Court, are supposed to understand.

LORD DENMAN, C. J. The cases are not within any of the rules referred to. It may, perhaps, be said that the translation of an ancient record is not a matter of fact which requires the production of a witness, and that the judge should be able to translate and explain it to the jury; but it is, at all events, convenient that such a person as Mr. Devon should be present to do so.

LITTEDALE, PATTESON, and WILLIAMS, Js., concurred.

Rule discharged.

The Earl of BEAUCHAMP against TURNER.—p. 218.

In a suit for subtraction of tithes in the Spiritual Court by an impropriator, defendant's personal answer stated a lease of them by plaintiff to a third party, by whom they were demanded, and also that they belonged to the vicar, and not to plaintiff. Defendant also put in a responsive allegation that, by immemorial usage, custom, and prescription, the tithes were deemed small or vicarial, and, as such, due to the vicar, and not to plaintiff. Plaintiff's personal answer denied the usage as stated by defendant; and the judge assigned a day to hear on the sufficiency of plaintiff's answer; and term probatory to defendant: Held that, in this state of the cause, there was no issue on the lease; that the only matter in issue, viz. the immemorial right of the vicar, was properly cognisable by the Spiritual Court; and that there was no ground of prohibition.

DENMAN had obtained a rule to show cause why a prohibition should not issue to the Consistory Court of the Bishop of Lichfield, to prohibit further proceedings in a suit for subtraction of tithes between the above parties.

The plaintiff sued as impropriator of certain tithes of the parish of Duffield in Derbyshire; among others of hay, potatoes, and agistment.

The defendant, in his personal answer to the different articles of the libel, stated two defences, namely, that the plaintiff had leased all his tithes to certain persons who had demanded them; and that the three kinds of tithes above specified belonged to the vicar, and not to the plaintiff. An allegation was also admitted on the part of the defendant, in which he alleged that, "by immemorial usage, custom, and prescription," the tithes of hay in the township of W., in which defendant's farm was situate, and the tithes of potatoes and of agistment in the parish, "have been and are deemed and taken to be small or vicarage tithes, and not great tithes," and, as such, due to the vicar and not to the plaintiff.

To this allegation the personal answer of the plaintiff denied that

(a) But see *Highfield v. Peake*, Moo. & Mal. 109, (22 E. C. L. R. 263.)

there was such immemorial usage, custom, or prescription as alleged by defendant with respect to the above-mentioned tithes.

The subsequent steps taken in the cause were entered in the Bishop's assignation book of causes as follows :

"Easter term, 1st session, 17th April. The judge, at Chinn's" (defendant's proctor) "petition, continued the assignation to hear on the sufficiency of the plaintiff's answer to the defendant's allegation to the next court day. The judge continued Chinn's term probatory to the next court day."

"2d session, 8th May. The term probatory of Chinn was renewed to the next court day."

"3d session, 22d May. The same to the next court day."

"Trinity term, 1st session, 5th June. Chinn alleged that his client was proceeding in prohibition."

Kelly and *Whitehurst* now showed cause. No issue is here joined upon the lease stated in the personal answer of the defendant, but only on the customary right of the vicar stated in the responsive allegation. The question is therefore one between the rector, or impropriator, and the vicar, which is no ground of prohibition; Com. Dig. *Prohibition*, (G 6); 18 Vin. Ab. 25, *Prohibition*, (Z) pl. 5 ;(a) *Cheeseman v. Hoby*, Willes, 680. If the issue had been upon the lease, it would, perhaps, have been more difficult to support the jurisdiction of the spiritual court; *Wortes v. Clifton*, 1 Rol. Rep. 61,(b) cited Com. Dig. *Prohibition*, (F. 14). But at present it does not appear that the lease is relied upon; it may, if relied upon, be confessed and avoided by some matter of law or matter ex post facto, which may not be denied, or of which the Court may have cognisance. There are many matters, pleadable at common law, of which the Spiritual Court may incidentally take cognisance, provided it comes to no decision repugnant to the common law; *Shotter v. Friend*, 2 Salk. 547. Thus, the jurisdiction in a suit for tithes is not ousted because a question of parish bounds may arise; or the suit is by a portionist; or a lease by the parson to the defendant is pleaded; or a custom of sowing corn, or of tithing, is alleged; Com. Dig. *Prohibition*, (G 6),(G 7); 18 Vin. Ab. 19, *Prohibition*, (U), pl. 23. If the insertion of some immaterial fact or statement in the pleading were to exclude the ecclesiastical jurisdiction, a party could always exclude it, even where the matter really in issue is clearly cognisable; and if the possibility of some future issue on a matter of common law cognisance is ground of prohibition, the Ecclesiastical Court may be prohibited in every cause. The effect of the pleadings, as they now stand, is illustrated by *Morgan v. Hopkins*, 2 Phil. Ecc. Rep. 582, and *Byerley v. Windus*, 5 B. & C. 1, (11 E. C. L. R.,) where it is stated by BAYLEY, J., p. 23, that neither the answer nor plea ever put in issue the facts of the libel. In *French v. Trask*, 10 East, 348, indeed, a prohibition was issued, where the defendant had proceeded no further than putting in an answer of a modus; but the effect of the pleading does not appear to have been understood; and in *Byerley v. Windus*, 5 B. & C. 22, (11 E. C. L. R.,) BAYLEY, J., refers to it as a case in which a modus was regularly pleaded, on which ground alone it can be supported. [LITTLEDALE, J. The modus might be admitted, and the parties only go for an account.] The defendant has applied to this Court too soon: *Hall v.*

(a) *Beddingfield v. Freke*. S. C. Moore, 909.

(b) S. C. (as *Worts v. Clyston*) Cro. Jac. 352. S. C. (as *Clifton v. Oates*) 2 Bulstr. 283

Maule, 7 A. & E. 721, (34 E. C. L. R.) Lord DENMAN, C. J. Are there any interrogatories on the lease?] There are none.

Denman, contra. *French v. Trask*, 10 East, 348, is exactly in point. The defendant there answered upon oath a modus; and no issue was taken on it; yet this Court prohibited the proceeding. So in *Byerley v. Windus*, 5 B. & C. 1, (11 E. C. L. R.) the personal answer, denying the prescriptive title of the plaintiff below, was considered sufficient to entitle the party to a prohibition; and it is there, p. 21, 22, said that "the courts of common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at once." The same principle is to be collected from *Darby v. Cosens*, 1 T. R. 552, which case shows that matter, intervening incidentally, will oust the spiritual jurisdiction. There ASHURST, J., said, 1 T. R. 555, "The instant the modus is pleaded, their jurisdiction is at an end."

Lord DENMAN, C. J. The rule must be discharged. *French v. Trask* is indeed like the present case; but the authorities show that the view taken by the Court in that case was erroneous. There is neither plea, nor allegation, tending to an issue on any matter which the spiritual court is incompetent to determine.

LITLEDALE, J. The personal answer of the defendant is nothing to the purpose. The issue between the parties involves nothing which the Ecclesiastical Court may not properly try.

PATTERSON, J. In order to raise an issue on the lease, it should be stated in a responsive allegation.

WILLIAMS, J., concurred.

Rule discharged.

ROFFEY, Administrator of ROFFEY, against GREENWELL and Another, Executors of STAPYLTON.—p. 222.

A promissory note in this form, "I promise for myself and executors to pay F. H. or her executors, one year after my death, 300*l.* with legal interest," bears interest from the date of the note.

ASSUMPSIT on a promissory note given by defendant's testator to Frances M. Harris, deceased, for 300*l.* and interest. Defendants paid into Court 336*l.* 6*s.*, and pleaded that plaintiff had not sustained damages to a greater amount. Plaintiff replied further damages. Issue having been joined thereon by consent and by a judge's order, the following case was stated for the opinion of the Court.

On the 20th July, 1808, Stapylton, the testator, made a promissory note to Frances Harris, of which the following is a copy.

"Norton, July 20th, 1808.

"I promise for myself and my executors to pay to Frances Mary Harris (or her executors) one year after my death, 300*l.* with legal interest.

"300*l.*

Henry Stapylton."

The note was endorsed—

"To Frances Mary Harris, Merstham, near Ryegate, Surrey."

On 3d October, 1808, Frances M. Harris married the plaintiff, Roffey. On or about 14th December, 1816, she died. On 21st August, 1835, Stapylton died, having by his will appointed defendants his executors, who duly proved the same. On 17th November, 1837, administration was granted to plaintiff of the goods and effects of his said late wife.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover, under the circumstances, more than the sum of 336*l.* 6*s.* paid into Court; and, if the Court should be of opinion that the plaintiff was entitled to recover more than the said sum, then judgment was to be entered against defendants, as executors, by confession, for such sum as the Court should direct. The case was argued in last Hilary vacation. (a)

Platt, for the plaintiff. Though there is no reported case exactly in point, the rule is, that a note, payable at a fixed time with interest, bears interest from the date of it; *Kennerly v. Nash*, 1 Star. 452, (2 E. C. L. R. 466;) *Doman v. Dibden*, Ry. & Moo. 381, (21 E. C. L. R. 465.) In *Richards v. Richards*, 2 B. & Ad. 447, (22 E. C. L. R. 119,) the interest on a note, given by the maker to his own wife, was held to commence from the date of the note; and, as she could not sue on it until after her husband's death, it was, in effect, a note made payable after his death. It would be absurd to suppose that a note, expressly bearing interest, and presumably given for value, was intended to carry no interest during the maker's life, though he lived twenty years afterwards.

Erle, contra. In the cases cited, the notes or bills were given for value received; and they appeared, either aliunde or on the face of them, to have been so given. *Richards v. Richards* was a loan in the husband's lifetime. Here, though a consideration must, perhaps, be presumed, it need not be a pecuniary consideration, or one on which interest may be supposed to run, as a loan; especially as the note does not profess to "bear" interest. No transactions or dealings between the parties are shown, to give probability to a claim of interest during the lifetime of the maker, who certainly could never have been himself called upon to pay any. [LITTLEDALE, J. It looks like a voluntary gift in the nature of a legacy.] (b)

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the following judgment.

The question was, from what period interest should be computed on a note in the following form,—“I promise, for myself and my executors, to pay to Frances Harris, (or her executors,) one year after my death, 300*l.*, with legal interest,”—no proof of the consideration being given.

It was admitted that no case in point could be found, nor any which lays down the rule, or principle, by which it is to be decided. Generally speaking, an instrument of this sort carries interest from its date, whether payable on demand, or at a time specified. The reason is, that the party who makes the promise, must be expected to keep it; and, if he does, no interest can be due from any other period than the date.

In the present case, there is, indeed, another period from which it might be computed, that of the maker's death: but it appears improbable that, if that was his intention, he should not have expressed it with more distinctness. We think, in the absence of all particular proof, that we must presume the note to have been given for value, so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker. The plaintiff is, therefore, entitled to the larger sum; and judgment must be entered for it.

Judgment for the plaintiff for principal and interest from the date of the note.

(a) February 6th, 1839, before Lord Denman, C. J., Littledale, and Coleridge, J.

(b) See *Maxze v. Shute*, cited in *Masterman v. Maberly*, 2 Hagg. Ecc. Rep. 247.

COLLINS against BEAUMONT.—p. 225.

Arrest on a writ of *ca. sa.*, is no bar to a *scire facias* on the judgment, where the party has been discharged out of custody by reason of irregularity in issuing the writ, on his own application.

SCIRE FACIAS to have execution on a judgment of the Court of Queen's Bench.

Plea: that, after judgment recovered, plaintiff sued out a *ca. sa.* upon it, under which defendant was arrested and detained in execution. Verification. Replication: that, whilst defendant was detained in the custody of the sheriff under the said writ, he made an application to one of the Barons of the Exchequer for his discharge out of custody for irregularity; that the said Baron did thereupon, on such application, and upon the grounds therein alleged by defendant, that the issuing of the said writ and taking defendant under it, were, according to the practice of the Court of Q. B., irregular, order defendant to be discharged out of custody with costs, defendant thereby undertaking not to bring any action on account of the arrest: that defendant was, in pursuance of the said order, discharged out of custody, and has never since been in custody thereon, or otherwise, in the said action; and that the order was afterwards duly made a rule of Court on the application of defendant. Verification.

General demurrer. Joinder.

The case was argued in last Hilary vacation. (a)

Wightman, in support of the demurrer. The arrest on the writ of *ca. sa.* is a satisfaction: and the plaintiff, having elected to issue it, can take no other proceeding on the judgment. The replication does not state the nature of the irregularity which caused it to be set aside, or show that the writ was void.

Lumley, contra. *McCormick v. Melton*, 1 C. M. & R. 525; S. C. 5 Tyrwh. 147, is in point. That was debt on a judgment; and the subsequent pleadings were like the present. Arrest on a *ca. sa.*, which, on being set aside, became a nullity, was there held to be no satisfaction.

Wightman, in reply. That case is certainly not materially distinguishable from this, though the replication there specifies the irregularity; but it appears not to have been fully argued, and ought to be reconsidered. If the plaintiff had consented to the discharge, he clearly could not have proceeded on the judgment: is he then to be in a better situation by reason of his own irregularity? A discharge by a judge, upon terms acquiesced in by the plaintiff, is equivalent to consent. Suppose the plaintiff, being aware of an irregularity, had consented on that account, to the discharge, this would have been satisfaction. [LITTLEDALE, J. Might not the irregularity have been the act of the Court, which should not prejudice the plaintiff?] It is not stated what the irregularity was; but if it was (as may be presumed) an irregularity of the party, then the defendant may be imprisoned twice through the plaintiff's own default. A writ irregularly issued, is not a nullity. It will still protect the officer.

Cur. adv. vult.

(a) February 4th, 1839. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, J.

Lord DENMAN, C. J., now delivered the judgment of the Court.

To a declaration in *scire facias* defendant pleads that he has been already arrested by virtue of a *ca. sa.* on the same judgment. Replication, that defendant was, on his own application, discharged from that arrest "for irregularity," not specifying what the irregularity was. The defendant demurred. On the argument we doubted whether an arrest on *ca. sa.* might not be a satisfaction of the debt, though it was irregular. We were referred, however, to a case in point, *McCormick v. Melton*, 1 C. M. & R. 525; S. C. 5 Tyrwh. 147, where the Court of Exchequer held such a replication good; Lord LYNDBURST saying that a writ, set aside for irregularity, was a nullity. This reason may possibly be too large: but we think the case well decided, for that a defendant cannot relieve himself from an arrest as irregular, and then set up the same arrest as a bar to a subsequent execution.

We must, therefore, overrule the demurrer.

Judgment for the plaintiff.

DOE on the demise ELIZABETH EVANS against HENRY EVANS.—p. 228.

Testatrix devised lands to L. for life, remainder to his first and other sons and daughters successively in tail. L. died, leaving one son, and one posthumous daughter. The son died. Testatrix, being ignorant of the existence of the daughter, made a codicil, reciting the death of L. without leaving any issue, and devising the land to H., in the same manner as she had before done to L.: Held, that the codicil must be construed as a conditional revocation only, and was inoperative as against the daughter of L., though testatrix, after making the codicil, and two years before she died, had become acquainted with her existence.

In an action of ejectment, tried at the assizes for the county of Anglesey, a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following special case.

Jane Jones, widow, being seised in fee of certain freehold premises, by her will, bearing date 28th July, 1819, and duly executed and attested to pass real estate, devised all her lands and tenements to certain trustees and their heirs, upon certain trusts therein mentioned as to part of her lands, not in question in this case, and, as to all the residue of her real estate, (subject to the payment of an annuity to Richard Owen during his life,) upon trust to the use of Lewis Evans of Holyhead, mariner, and his assigns, for and during the term of his natural life, without impeachment of waste; remainder to the said trustees, in trust to preserve contingent remainders; and, from and after his decease, to the use of the first and other sons of the said Lewis Evans, in tail; and, for default of issue in tail of such sons, to the use of the first and other daughters of the said Lewis Evans, in tail; and, for default of such issue in tail, to the use of her own right heirs for ever.

On 27th May, 1829, the testatrix duly made the following codicil to her said will. Whereas, in and by my will, I have given the residue of my lands, &c. (subject to an annuity of 20*l.* to my cousin Richard Owen for his life,) to the use of Lewis Evans, of Holyhead, and his assigns, for life; with remainder to his first and other daughters in tail; with remainder to my own right heirs: *and whereas the said Lewis Evans has since departed this life without leaving any issue*; now I do hereby give and devise all the residue of my lands, &c., as mentioned

in my said will, (subject to the payment of the said annuity,) unto and to the use of my relation, Henry Evans, and his assigns, for the term of his natural life, without impeachment of waste. The codicil then proceeded to make the same settlement on the first and other sons of Henry Evans in tail, and, on failure of their issue, on his first and other daughters in tail, that she had previously made in favour of Lewis Evans and his issue.

Lewis Evans and Henry Evans were each related in the same degree to the testatrix, and were first cousins to each other.

Lewis Evans was married in 1818, and in 1820 had a son born. He died in September, 1821, leaving his wife pregnant with Elizabeth Evans, the lessor of the plaintiff, who was afterwards born, a posthumous child, in February, 1822. The son of Lewis Evans died in 1825. The testatrix, when she made the codicil to her will in 1829, did not know of the birth and existence of Elizabeth Evans, the daughter of Lewis Evans; but she became acquainted with those facts afterwards, in 1831, two years before her death. The testatrix died in 1833.

The question for the opinion of the Court was, whether the codicil, made under the above circumstances, had the effect of revoking the devise of the residuary real estate in the will, under which devise the lessor of the plaintiff claimed the premises in question. If the Court should be of opinion that the codicil did not revoke the devise in the will, but that the devise to the lessor of the plaintiff was a valid and subsisting devise at the time of the death of the testatrix, and that she was entitled under the same to the premises in question, then the verdict was to stand. But, if the Court should be of a contrary opinion, then the verdict was to be entered for the defendant.

R. V. Richards for the plaintiff. The codicil, being made under error, and in ignorance of the existence of a daughter of Lewis Evans, is inoperative, and does not revoke the prior disposition of the will. If a false impression of fact is the apparent foundation of the change of intent shown in a later will or codicil, the operation of the latter is contingent upon the existence or non-existence of the fact. Such is the rule laid down in the text books; Swinburne on Wills, part vii. s. 5, (p. 894, &c. 7th ed.;) Powell on Devises, 1 vol. p. 523, (3d ed., by Jarman;) 1 Williams on Executors, p. 93, (2d ed.;) Roberts on Wills, Vol. II. p. 40, (3d ed.) Some of the cases referred to as authorities for this proposition are, indeed, cases of personalty; but there is no distinction, in this respect, between wills of real and of personal property. (a) In *Campbell v. French*, 3 Ves. 321, where the death of the legatee was alleged as the cause of revocation in a subsequent codicil, and it was proved that the legatee was not, in fact, dead, Lord LOUGHBOROUGH, C. held that the codicil did not revoke the legacy. In *Kendall v. Abbott*, 4 Ves. 862, a legacy made under a misapprehension of the legatee's character was held to fail. In *Attorney General v. Ward*, 3 Ves. 327, the revocation was considered sufficient, because it was founded only on doubts of the testatrix whether the former legatees were still living, "and well provided for;" yet the general rule seems to be conceded by Sir R. P. Arden, Master of the Rolls, who refers to the well known case mentioned by Cicero, (De Orat. lib. 1. 38) "Pater, credens filium suum esse mortuum, alterum instituit hæredem; filio domi redeunte, hujus

(a) See, however, the judgment of the Court of Exchequer Chamber, in *Morston v. Roe & Fox*, 8 A. & E. 55, 56, (35 E. C. L. R. 303.)

institutionis vis est nulla." (a) *Attorney General v. Lloyd*, 3 Atk. 551. turned on a codicil made under an error respecting the illegality of a former devise; and the error was not considered sufficient to vitiate the codicil. In *Gordon v. Gordon*, 1 Meriv. 141, a bequest to a natural child was sustained, where the testator in his will expressed his "belief" that the child was his; and the validity was held not to depend on the fact of its being really his child, because he chose to assume it, and to act upon that assumption; but Lord ELDON, C., there admits that the failure of a reason, assigned positively, would have destroyed the legacy. Where a testator made a fresh will on the supposition that a former one was lost, and the old one was afterwards found, the Prerogative Court held the second to be no revocation of the first: *In the Goods of Richard Moresby*, 1 Hagg. Ec. Rep. 378, (2 E. Ecc. R. 164.)

Jervis, contrà. The devise in the codicil is absolute; and it matters not whether the alleged ground of the alteration be true or not. In *Attorney General v. Lloyd*, Lord HARDWICKE says, "It is a very nice thing to say, that because the reason a man gives for his devise is false, therefore his devise shall fail." Suppose the devise had been to the testator's "son," or to his "chaste wife," there would have been no pretence for impugning its validity by disputing the paternity in the one case, or the chastity in the other. *Kennell v. Abbott*, 4 Ves. 802, (b) shows this. The decision in that case was founded on the fraud of the legatee in representing himself to be single when he married the testatrix, and thereby obtaining a legacy as her husband. That is the doctrine of the Digest, xxxv. tit. 1, c. 72, s. 6. (c) In order to avoid the codicil, the error should have originated in a deceit practised on the testator: 1 Powel on Devises, p. 525. If the recital had been wholly omitted, then the codicil, however inconsistent with the will, would have been unquestionably good; and it would have been of no avail to show, by extrinsic evidence, that the codicil was, in fact, founded on misapprehension. The cases cited on the other side are all on legacies of personal property; and, though there is perhaps no sound distinction between wills of land and of personalty, yet the ecclesiastical courts take more liberties in dealing with wills than the courts of law. They are, for the most part, cases in which a legacy was merely revoked without any substitution of another object in place of the first. *Campbell v. French*, 3 Ves. 322, was a case of this kind. There the revocation was indeed idle, if the legatees were really dead. [PATTESON, J. Where there is a residuary legatee, there is, in fact, a substitution.] The question is one of intention. Here the testatrix let the codicil stand for two years after the real circumstances of the case had come to her knowledge. She died therefore with a full knowledge of both law and fact, and without altering either the codicil or the recital. She has, therefore made an absolute devise to Henry, and must be taken to have continued of the same mind at the time of her death, when she laboured under no misapprehension.

R. V. Richards, in reply. If the codicil was bad when made, it cannot afterwards become a good one. The attempt to look at the mind

(a) The citation stands thus in *Cook v. Oakley*, 1 P. Will. 302; but it is not in the language of Cicero, who does not state the result. The same case, with the decision in favour of the son, is alluded to by Valerius Maximus, lib. vii. c. 7, s. 1. See a decision similar to that in the text, cited from Paulus, in Dig. xxviii. tit. v. c. 92.

(b) See p. 809.

(c) See also Cod. vi. tit. 24, c. 4.

of the party at the time of death, and not at the making of the will, was disallowed in *Marston v. Roe dem. Fox*, 8 A. & E. 14, (35 E. C. L. R. 303.) If it were otherwise, at what precise period of time, during the two years, did the codicil become a good one? There must be republication, after full information, in order to set it up. Fraud was not the ground of the decision in *Campbell v. French*, but the erroneous recital. As to the supposed case of a legacy to a man's "son," eo nomine, it would not take effect unless he were the son, or had the reputation of being so. The only question, in such cases, would be, whether the person were sufficiently described, and the exact truth of the description would be of secondary importance. The cases of *Campbell v. French*, and *In the Goods of Moresby*, 1 Hagg. Ec. Rep. 378, (2 E. Ecc. R. 164,) are unanswered, and no authority has been produced against them. [Lord DENMAN, C. J. In *The Lord Cheyney's Case*, 5 Rep. 68 b, there is a remark apparently at variance with the doctrine which you support. "If a man who has two sons both baptized by the name of John, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may in pleading or in evidence allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead." (a) This seems to assume that the will, though made under error, would nevertheless stand. PATTESON, J. It does not follow that the father would not have preferred the younger son, even if he had known that both were alive.]

LORD DENMAN, C. J. The authorities cited on the part of the plaintiff show that such a revocation as this is a conditional one. It is clear, on the face of the codicil, that the testatrix had no intention to interfere with her former disposition by the will. No intention to revoke it can be inferred. The doctrine in *The Lord Cheyney's Case*, is distinguishable; for we have there no revocation of a former will, nor any proof of what the testator would have done if he had known of his mistake.

LITLEDALE, J. There is evidently no intention to leave the property away from the family of Lewis. The daughter was a posthumous child, and was probably unknown to the testatrix on that account. The codicil was intended to take effect only on failure of the original devise; and I am therefore of opinion, under the circumstances, that nothing passed by it, unless it may possibly hereafter have the effect of giving the property to Henry upon the failure of the original devise. As to her becoming acquainted with the fact after the codicil was made, this alone cannot set it up; otherwise it might be established by showing that she lived only one day after she knew of the daughter's existence.

PATTESON, J. The meaning of the party at the time of making the codicil is alone to be looked at. At that time she knew nothing of the birth of a daughter; she therefore states that Lewis had "since departed this life without leaving any issue," that is, any issue now living. We must read this as if it had been, in terms, a devise to Henry, provided Lewis and his issue are really dead. If it had been so expressed,

(a) The report goes on thus: "No inconvenience can rise if an averment in such case be taken in case of a devise by will, for he who sees such will, whereby land is devised to his son John, cannot be deceived by any secret invisible averment; for when he sees the devise to his son John, he ought at his peril to inquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent."

the subsequent information would clearly have made no difference. To give such an effect to a subsequent knowledge of the circumstances, would be making a new codicil for the testatrix. All that Lord HARDWICKE appears to mean in *Attorney General v. Lloyd*, 3 Atk. 551, is, that a man shall not die intestate merely because he gives a false reason for his bequest. This is not a dying intestate, but a restoration of the original will.

WILLIAMS, J. This is admitted to be a question of intention. Now the codicil evidently does not proceed on any change of mind in regard to the original devisee. It only substitutes one devise for another, on the supposition that the first cannot take effect. The condition of revocation fails, because it appears that the party, who was always intended to be benefited, is capable of receiving the benefit intended.

Judgment for the plaintiff.

WILSON against HOARE and Eleven Others.—p. 236.

By a decree in Chancery, to which the lord of the manor was a party, it was ordered that whenever the trustees of a certain parochial charity, consisting of copyhold of inheritance, should be reduced to five, the lord should, with the approbation of a master, name nine others, being copyholders and inhabitants of the parish; that a surrender of the lands should then be made, and the fourteen be admitted, paying a reasonable fine. The trust became vacant by the death of ten, and resignation of two of the trustees so appointed; and fourteen new ones were thereupon duly appointed and admitted. Held, (there being no special custom as to fines on such admittance,) that a fine, made up of the sum of a geometrical series of nine terms, whose first term was the double value and common ratio $\frac{1}{2}$, with a deduction on account of the right to a renewal fine recurring on the failure of any nine lives out of fourteen, instead of nine absolutely, was reasonable.

Held, also, that the lord was not bound to make a further deduction by reason of his privilege of naming the lives, or the mature ages of the trustees.

The reasonableness of such a fine, where the value of the land, and the amount of deduction, are undisputed, is not a question for the jury.

ASSUMPSIT by the Lord of the Manor of Hampstead, to recover the sum of 3900*l.* for reasonable fines due from defendants to plaintiff on their admission into certain customary tenements of the said manor, to hold to them, their heirs and assigns, according to the custom. Money had and received, and account stated. Plea, the general issue.

The cause was tried at the Middlesex sittings after Trinity term, 1837, before Lord DENMAN, C. J., when it appeared that the defendants were trustees of a parochial charity, called the Wells charity, founded in 1698, and established by a decree of the Court of Chancery in 1729, to which the then lord of the manor and trustees were parties. By that decree, it was ordered that, whenever thereafter the number of trustees should be reduced to five, the lord should, with the approbation of the master, nominate nine others, being copyhold tenants of the manor, and inhabitants of the parish of Hampstead, to be added to the five, and a new surrender of the charity lands should be made to their use on the same trusts; and that the lord should admit them, paying a reasonable fine.(a)

In July 1826, upon the death of twelve, and resignation of two, of

(a) A fuller statement of the foundation and decree will be found in *Wilson v. Hoare*, 2 B. & Ad. 850, (22 E. C. L. R.)

the trustees,^(a) the whole number of fourteen, including defendants, were admitted to the charity lands, being copyhold of inheritance; and the fine was eventually assessed at 3900*l.* Two of the trustees had since died. The annual value was admitted to be 1000*l.*; and the plaintiff's calculation of the fine was founded on the rule laid down in *Wilson v. Hoare*, 2 B. & Ad. 350, (22 E. C. L. R.,) with a further deduction in consequence of the renewal being on the failure of nine lives out of fourteen, and not of nine lives absolutely. The amount so deducted was, in fact, a larger one than the calculation of the plaintiff's witnesses, at the trial, required to be made. It was proved that the fines taken on admittances within the manor were arbitrary; and some evidence was adduced of a special custom to assess the fine, in the case of joint admittances, on the above principle; but the plaintiff's counsel contended that, independently of such evidence, the reasonableness of the fine was matter of law, and that, the value being admitted, it followed, as a consequence of law, that he was entitled to the sum assessed. On the part of the defendant it was contended that the rule, as laid down in *Wilson v. Hoare*, was inapplicable to a case like the present; that the deduction, in respect of the expired lives being nine out of fourteen, was not enough; and that a further deduction should be made in respect of the power of the lord to select those lives, and of the mature age of the parties, who would probably be selected as trustees of such a charity; that the value of the particular lives actually admitted should be taken into consideration; and that the reasonableness, generally, was a question for the jury. His Lordship admitted evidence of the unreasonableness of the fine on the above grounds. The jury found that the lord was entitled to an arbitrary fine; that there was no special custom applicable to the case of joint tenants, or to the case of parties re-admitted upon a surrender; and that the fine assessed was unreasonable. A verdict was thereupon entered for the defendants, with leave to move to enter it for the plaintiff.

In the following term *D. Pollock* obtained a rule nisi to enter a verdict for the plaintiff, and for a new trial on the grounds of misdirection and that the verdict was against evidence. In last Easter term,^(b)

Sir *John Campbell*, Attorney-General, *R. V. Richards*, and *Carey*, showed cause, and contended that, the evidence of custom having failed, the only question was as to the reasonableness of the fine; and that this was a question for the jury, who might find what was reasonable under the particular circumstances of the case: *Jackman v. Hoddesdon*, Cro. Eliz. 351. That the principle of calculation, as laid down in *Wilson v. Hoare*, 2 B. & Ad. 350, (22 E. C. L. R.,) was inapplicable, and would lead to injustice, especially where the lord had the choice of the lives, and the range of selection was limited to a certain class of persons. In order to show this, they repeated the arguments used on this head upon the discussion of that case, and relied upon certain calculations which had been submitted to the jury on behalf of the defendants, and which were founded on the number and ages of the trustees admitted, and the terms of the decree. They contended that, although the plaintiff, at the trial of the cause, disclaimed a right to take any fine in respect of any surviving trustees who should surrender for the mere purpose of

(a) The statement made by the Court in 2 B. & Ad. 350, as to the manner in which the vacancies had occurred, was admitted to be incorrect.

(b) May 1st, 1839, before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.
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being admitted with the new ones, yet, as any customary exemption, in such a case, was negated by the jury, the disclaimer was voluntary and purely gratuitous, and, not being founded on any custom or general principle of law, would neither bind himself nor his heirs or assigns, so as to prevent him or them, on any future occasion, from claiming in respect of every one of the trustees admitted. That, although the Court of Exchequer Chamber, upon a bill of exceptions in this case, (a) had awarded a venire de novo solely on the ground that the deduction had not been made, which the plaintiff had now allowed, it did not follow that it was the only deduction requisite, or that there was no other objection to the former assessment.

On the principle of assessment in the case of joint tenants, they cited the following cases: *Roe dem. Ashton v. Hutton*, 2 Wils. 162; *HOLT, C. J.*, in *Fisher v. Wigg*, 1 Ld. Ray. 631, *Earl of Bath v. Abney*, 1 Burr. 206, *Attree v. Scutt*, 6 East, 484, (b) *Garland v. Jekyll*, 2 Bing. 298, (9 E. C. L. R.,) *The Dean and Chapter of Ely v. Caldecot*, 8 Bing. 439, (21 E. C. L. R.,) *Rex v. The Lord of the Manor of Bonsall*, 3 B. & C. 173, (10 E. C. L. R.,) *Phypers v. Eburn*, 3 New Ca. 250, (29 E. C. L. R.,) They also referred to *Kitch. on Courts*, 122, a (ed. 1613,) cited in *Com. Dig. Copyhold*, (H. 1,) and *Wharton v. King*, 3 Anstr. 659.

D. Pollock and John Scriven, contra, admitted that the plaintiff must fail unless he could recover the whole fine demanded, but contended that, as the courts had taken upon themselves to say that two years' value was a reasonable fine for the admittance of one tenant, the question of reasonableness was no longer one of fact but of law. That the decision of the Exchequer Chamber, if a right one, had, for the first time, introduced the question of the value of life into the calculation. [Lord DENMAN, C. J.—The question of reasonableness can hardly be withdrawn from the jury, if a deduction is to be made on that account. The testimony of actuaries must be submitted to them, in order to ascertain the amount of deduction.] The jury must find agreeably to the direction of the Judge. The fine was properly assessed on the principle laid down by this Court; and, though the deduction required by the Judges in the Exchequer Chamber was questionable in principle, the plaintiff was content to submit to it; but the other deductions claimed were inadmissible. That the lives were indeed named by the lord; but his nomination was subject to the control of Chancery by the terms of the decree; and the value of the lives ought not to be considered beyond the extent sanctioned by the Court of Exchequer Chamber. That, although the present fine was large in consequence of the failure or resignation of all the trustees, so that the whole double value, viz. 2000*l.*, could be taken for the first life, 1000*l.* for the second, and so on, instances of this kind could never occur if the number was duly filled up as soon as it was reduced to five; and that, when the lord had to name and admit the next nine trustees, the fine could hardly exceed 120*l.*, unless the property was much improved. (c) That, in fact, it was a hardship on the lord

(a) See post, the report at the end of this case.

(b) See *Holloway v. Berkeley*, 6 B. & C. 2.

(c) The fine was thus calculated:—

						£	s.	d.
1st Life	.	.	.	.	.	2000	0	0
2d Ditto	.	.	.	.	.	1000	0	0
3d Ditto	.	.	.	.	.	500	0	0
4th Ditto	.	.	.	.	.	250	0	0

that, if the charity was properly managed, he never could take a full fine, but only a reversionary one, deducting the fines in respect of the surviving trustees.

Cur. adv. vult.

On this day the judgment of the Court was delivered by

LORD DENMAN, C. J. This long-pending case has at length found its termination. It was an action for a fine of 3900*l.*, due to the lord of the manor of Hampstead, in respect of the admission of fourteen persons, joint trustees of a charity, to a copyhold estate within the manor.

This estate was granted near 150 years ago: new trustees are directed, under a decree of the Court of Chancery of a date not much later, to be successively appointed by the lord, subject to the approbation of a Master in Chancery; and, whenever nine should have dropped, nine new ones were to be in like manner nominated and approved to complete the number.

It happened that all the fourteen were removed by death or resignation, and the whole number of fourteen was admitted.

The lord claimed a fine of upwards of 5000*l.*, calculated on the principle of two years' value for the first life, one year's value for the second, one-third of the same amount for the third, and so downwards. My brother PARKE tried the cause, and, thinking the fine so calculated unreasonable, directed a nonsuit. Lord TENTERDEN and the Court agreed in his opinion; but, being much pressed, and (as they certainly understood) by both parties, to lay down a rule for making the calculation, they take time for consideration, and then pronounced the rule. It was this: that the fine on the first life should be 2000*l.*, double the admitted yearly value of 1000*l.*; that on the second, the half of that sum, or the single yearly value; that on the third, the half of that last amount, or 500*l.*; thus always halving the last addition to the fine in a descending series.

This was on the ordinary principle that an arbitrary fine means a reasonable fine, and that such is the correct legal method of estimating a reasonable fine.

A second action having been brought for this amount of fine, my brother PATTESON, on the trial,^(a) laid down this rule, and directed a verdict accordingly. But the defendants were still dissatisfied, and took the case by bill of exceptions to the Exchequer Chamber,^(b) on the

5th Ditto	.	.	.	.	.	.	125	0	0
6th Ditto	.	.	.	.	.	.	62	10	0
7th Ditto	.	.	.	.	.	.	31	5	0
8th Ditto	.	.	.	.	.	.	15	12	6
9th Ditto	.	.	.	.	.	.	7	16	3
10th Ditto	.	.	.	.	.	.	3	18	1
11th Ditto	.	.	.	.	.	.	1	19	0
12th Ditto	.	.	.	.	.	.	0	19	6
13th Ditto	.	.	.	.	.	.	0	9	9
14th Ditto	.	.	.	.	.	.	0	4	10

The fine, claimed by the plaintiff in the present case, consisted of the sum of the first nine terms of the above series. He stopped at the ninth, because, after the failure of nine lives, he would be entitled to a renewal fine. When the number so admitted should be reduced to five, the plaintiff professed to claim, in respect of the nine new lives, only a fine composed of all the above sums *after* the fifth life, viz. 124*l.* 14*s.* 11*d.*, which he called "a reversionary fine." But the court rolls did not appear to support the alleged custom in this respect.

(a) *Sittings after Hilary term, 1833.* A short report of that trial will be found in *Scriven on Copyhold*, pp. 393, 394, (3d ed.).

(b) See note at the end of this case.

ground that the learned Judge had refused to direct the jury that the fine ought to be reduced by the consideration that the renewal was to be, not on the dropping of nine specified lives, but on the dropping of nine out of fourteen specified lives, and would therefore occur sooner. There was but little discussion: but C. J. TINDAL and Lord LYNDHURST both expressed an opinion that a reduction ought to have been made on the ground suggested; and the plaintiff appears to have acquiesced in it, and to have left the court persuaded that he had its authority for claiming the fine so estimated, as in 2 B. & Ad. 350, and so reduced, as reasonable in point of law.

A venire de novo was then awarded, and the case came before me at Nisi Prius.(a) Very different reports were brought from the opposite sides of what had occurred in the Court of Error: a new difficulty was started by the defendant, who recovered a verdict for want of the plaintiff's showing himself to be thus entitled under any custom of the manor, and because the jury found the fine to be unreasonable. The Court, however, thought that the case did not turn upon the custom, and that the question, as to the reasonableness of the fine, was not for the jury; and a new trial was granted.

On this fourth trial Mr. Pollock rested the plaintiff's case on the law as propounded by my brother PARKE and this Court in the first instance, as qualified by what was afterwards introduced into it in the Exchequer Chamber.

He gave some evidence of a custom, where a second life was added, to exact half the fine that had been paid on the first; but the instances were not numerous: they proved but little as to any number of tenants admitted at once, and, on the whole, laid so slender a foundation for a custom, that we can by no means condemn the verdict finding that there was no proof of such custom. The plaintiff, however, proceeded to prove what deduction ought to be made in respect to the renewal being on the dropping of nine lives out of fourteen, and not of nine specified lives; and, having established his point by undisputed evidence, claimed the verdict for a fine of somewhat lower amount as a necessary consequence of law.

The defendant was allowed to give evidence, subject to what the Court should decide on its applicability, that that fine would be in fact unreasonable, from the lord's privilege of naming the lives, and the probability that, for that reason, and on account of the necessity of charity trustees being persons of mature age, the lives would fall more frequently than if they had been nominated by the grantees. This issue of fact the jury also found for the defendants; but the plaintiff contended that it was immaterial, and had leave to move that a verdict should be entered in his favour.

We are of opinion that this must now be done. The original grant by the lord must be considered as if it had been made and accepted by the trustees on the terms afterwards prescribed by the decree in Chancery. Whenever they applied for a renewal, they would have to pay an arbitrary, that is a reasonable, fine. We agree with the decision of this Court that a reasonable fine is to be calculated on the number of lives by beginning with two years' improved value, and halving it, and then halving the half of it, and so on, in a geometrical series, by which means the fine can never equal four years' improved value.

Whether we agree or not with the Exchequer Chamber, that the re-

duction adopted by that Court ought to be made, is immaterial for the present purpose, since the plaintiff is contented to reduce it on that principle.

Rule absolute to enter verdict for the plaintiff for 3900*l.*(a)

(a) See *Sheppard v. Woodford*, 5 M. & W. 608.

HOARE and Thirteen Others against WILSON.

Where the lord admitted fourteen joint tenants to a copyhold of inheritance, with a power in himself to nominate nine others with the approbation of a Master in Chancery, when the number should be reduced to five, and thereupon to take a reasonable fine on such fresh admission of the old and new tenants: Held, by the Court of Exchequer Chamber, that the principle of assessment laid down in *Wilson against Hoare*, 2 B. & Ad. 350, (22 E. C. L. R.) was inapplicable, and that a deduction should be made on account of the right to take a new fine on the failure of nine lives out of fourteen, instead of nine absolutely.

THE following is a note of the proceedings on the bill of exceptions, argued in error in the Exchequer Chamber (22d April, 1834), before Tindal, C. J., Lord Lyndhurst, C. B., Parke and Gaselee, Js., Vaughan and Bolland, Bs., Alderson, J., and Williams, B.

The bill stated that an action had been brought by *Wilson against Hoare* and thirteen others, for a fine of 3985*l.* 10*s.*, assessed on the admittance of defendants to a copyhold in fee, and that issue was joined on a plea of non assumpsit, which came on to be tried before Patteson, J., in the absence of Lord Denman, C. J. That plaintiff then proved that the tenements were parcel of the manor, whereof plaintiff was the lord. That, in 1698, the then lord, with consent of the homage and of mere grace and favour, granted six acres of heath (being the property now called the Wells Charity estate), to hold to them, their heirs and assigns, at the will, &c., by the yearly rent of 5*s.*, and the services due and accustomed, in trust for the poor of the parish of Hampstead. It then stated the admittance of defendants, and assessment and demand of the above fine, and that the annual value of the tenement was 1000*l.* after deducting quit rents. It showed that there had been, on an average, an admittance to the above tenements (besides admittances to additional parcels of land), every 21½ years since 1698, and that the following were the fines then paid.

In 1698.	Fourteen trustees admitted	Fine £ 30
1730.	Three surviving and eleven new trustees	[...]
1743.	Three surviving and eleven new, on the death of ten and resignation of one	150
1763.	Five surviving and nine new, on the death of nine	151
1783.	Two surviving and twelve new, on the death of eleven and resignation of one	450
1801.	Four surviving and ten new, on the death of ten	579

The bill then stated the ages of the defendants at the time of their admissions, and the ages of the two retiring trustees; and that no building had been erected since 1801. That defendants then gave in evidence the decree of 1729 (see ante, pp. 236, 237), and proved, by an actuary, that, if copyhold premises be held on a single life of thirty years, the interest in it would last, on an average, twenty-eight years; that, if one life, aged thirty, would be worth, on renewal, 2000*l.*, then two lives of the same age would be worth 2430*l.*; and three such lives, 2608*l.*; and that the addition of any further number could not exceed 3000*l.* That, if 2000*l.* was a reasonable fine on the admission of one life, the admission of fourteen, of the several ages of the defendants, to be renewed when reduced to five, would be 2111*l.*; and that the interest in fourteen lives, which are to be surrendered and re-admitted when reduced to five, is not so valuable as the interest in nine absolute lives. That the judge then declared his opinion to the jury, that the fine assessed by the plaintiff was reasonable and lawful, and that the evidence did not differ the case from the ordinary one of joint tenants admitted for their own lives. That defendant's counsel excepted to such opinion, and insisted that the right of the lord to put in the new lives did make an essential difference with respect to the ages of the parties put in, and the reasonableness of the fine. That the judge further declared his opinion to the jury, that it did not affect the case in point of law, that the fourteen trustees were admitted for the lives of the nine among them who should soonest die, and not for nine absolute lives, and directed the jury to find for the plaintiff accordingly. Whereupon the defendants' counsel insisted that the rule of law, which allowed more than two years' improved value to be taken on the admission of more than one tenant, ought not to be extended to a case where the best lives were in favour of the lord, and the lives, on which the fine was calculated, were the shortest out of a larger number; and that, as the plaintiff did not bring his case within the general custom of copyholds, and neither

alleged nor proved any special custom in that behalf, the judge ought not to have directed the jury to find for the plaintiff, but for the defendants, &c.

R. V. Richards, for the plaintiff in error, was stopped by the court.

Scriven, Serjt., contra, contended that the fine was rightly estimated by taking 2000*l.* for the first life, and so halving successively down to the ninth life inclusive. Strictly, the fine so calculated was 8992*l.* 8*s.* 9*d.* That this was the proper way where fourteen persons were admitted, with the prospect of renewal on the failure of nine lives. That the rule confining the fine to the double value did not apply where joint-tenants are admitted, or where other circumstances unfavourable to the lord intervened; *King v. Dillington*, 1 Freem. K. B. and C. P. 496. That the present case was one of great hardship; for, in the case of a renewable trust, there would be no fines on descent, demise, sale, settlement, mortgage, &c.; and a full fine could never be taken, if the trust was kept filled. That this was copyhold of inheritance, and not for lives, which was an important distinction. That the lord, instead of reaping advantage from the failure of all the tenants as in other cases, was here bound by the decree to renew the trust, and was thereby deprived of valuable casualties. That the original grant and decree reserved to him his "reasonable" fine, and "all services due and accustomed," and, therefore, was not intended to prejudice his rights. [*R. V. Richards*. It is a question whether any fine can be taken under such circumstances, without a special custom.]

Upon the argument, TINDAL, C. J., and Lord LYNCHURST, C. B., intimated a strong opinion that, in assessing a reasonable fine, some deduction should be made in consideration that the renewal fine would be due on the failure, not of nine lives absolutely, but of nine of the worst lives out of fourteen. They further thought that the lord was not entitled to any increase in the fine by reason of any hardship or disadvantage occasioned by the terms of the decree to which he was a voluntary party. But the Court strongly urged the parties to refer the amount of the fine to a Master in Chancery.

On the 29th May following (until which day the case stood over for the parties to agree), TINDAL, C. J., said,—We decide against the application of the rule laid down by the Court of King's Bench. We think it does not apply under the circumstances. There must be a *venire de novo*. Lord LYNCHURST.—It is a very plain case.

Venire de novo awarded.

The QUEEN against The Lord and Steward of the Manor of OLD HALL.—p. 248.

Mandamus to the lord and steward of the manor of O., recited that, at a manor court holden before the steward in May, a plaintiff in the nature of a writ of right, according to the custom, &c., was presented to the steward, received by him, and enrolled in the Court rolls: that, at a Court holden in August, the demandant and tenant appeared, but that the steward refused to proceed upon the plaint; and the *mandamus* commanded the lord and the steward to proceed on the said plaint.

Return, that, at the Court of August, the tenant objected to the making the plaint, as erroneous and irregular on two grounds; whereupon, it was considered and ordered by the Court that, for those errors, the plaint and proceedings should be set aside, reversed, annulled, and altogether held for nothing; and that the Court would take no further cognisance thereof; and thereupon the plaint and proceedings were set aside, &c.; that, notwithstanding, a Court was holden, in obedience to the *mandamus*, in the October following the issuing of the *mandamus*, whereat, the tenant contended that, for the former objections and another, the plaint presented in May, was erroneous and irregular; and, upon those grounds, and because of the judgment of the Court in August, he prayed that the plaint might be held for nothing, and that the Court would take no further cognisance thereof; whereupon, it appeared to the Court that there was error in the plaint and proceedings, and that the Court ought not to take cognisance or proceed thereon; and it was considered and adjudged that the plaint and proceedings were rightly set aside at the Court of August, and that the Court ought not to take further cognisance thereof.

Upon objection that the return was contradictory and repugnant, as showing that the Court proceeded in October upon a plaint already annulled, and that there was no judgment set forth,

Held, that the return was good, inasmuch as there was no contradiction, and the Court appeared to have adjudged; and this Court, upon the present proceeding, could not inquire whether or not the adjudication was erroneous or informal.

MANDAMUS, tested 12th June, 1st Victoria, to the lord and steward of the manor of Old Hall, in East Bergholt, in Suffolk. The inducement recited that, at a court duly holden for the said manor, before the

said steward, on or about 29th May, 1835, a certain plaint, in the nature of a writ of right patent at common law, according to the custom of the manor, wherein Thomas Blundell was the demandant, and Nathaniel Templeman and Robert Maitland were the tenants, was presented to the steward on behalf of the said T. B., then and still claiming to be entitled, as customary heir of Shadrach Blundell, deceased, to certain copyhold property in East Bergholt in the said county, holden of the said manor, and that the said plaint was then and there received by the steward, and duly enrolled in the court rolls of the manor; and N. T. and R. M., the tenants of the plaint, were thereupon summoned to appear at the then next general customary court baron of the manor, to be holden on 5th August then next, to answer the said T. B. in such plaint, according to the custom, &c.; that, at the general customary court baron holden for the said manor before the steward, on the said 5th August, 1835, one John Penory Hume, in pursuance of a warrant or power of attorney, duly executed by the said T. B. under his hand and seal, duly attested, authorizing the said J. P. H. to appear for the said T. B. as his attorney in the said plaint, theretofore duly entered on the rolls of the manor, then and there appeared on behalf of the said T. B.; and the said N. T. then and there appeared by W. H., his attorney duly authorized in that behalf; and the said R. M. then and there also appeared in his proper person; whereupon the steward, according to the custom, &c., ought immediately to have proceeded upon the plaint; and the said J. P. H., on behalf of the said T. B., then and there demanded of the steward to proceed thereon, according to the custom, &c., but that the steward then and there wholly refused to proceed upon the plaint, nor had at any time since proceeded therein, although application had oftentimes been made to him, on behalf of the said T. B., so to do; in contempt, &c. The writ then commanded the lord and steward, and each of them, that immediately after the receipt of the writ they should proceed upon the said plaint so presented, &c., on the said 29th May, 1835, as aforesaid, and that they and each of them should do every act necessary to be done by them, or either of them, in order to enable the said T. B. to prosecute the said plaint; or that they should show cause, &c.

Return (dated 2d November, 1st Victoria), that, at the court holden for the said manor on 5th August, 1835, as in the writ mentioned, and on the appearance thereof of T. B., N. T., and R. M. respectively, as in the writ mentioned, N. T. and R. M. said that, in the making of the plaint in the manner in the writ mentioned, and in the proceedings thereon, there was an error and irregularity in this, to wit, that T. B. should have entered the plaint in person, and not by attorney; and that there was also an error and irregularity in this, to wit, that there was no warrant of attorney, by deed or otherwise, to warrant the said J. P. H. to be attorney for the said T. B. in entering the plaint; and the said N. T. and R. M. thereupon prayed that the plaint and proceedings aforesaid, for the errors and irregularities aforesaid, and other errors in the pleadings aforesaid, might be set aside, reversed, annulled, and held altogether for nothing; and that the said court would take no further cognisance of the plaint. Whereupon, the matters aforesaid so alleged by the said N. T. and R. M. for error being seen, and by the said court understood, and deliberation being thereupon had, it appeared to the court that, in the entering of the plaint, and in the proceedings

aforesaid, there was manifest error; therefore it was *considered and ordered* by the court there that, for the errors aforesaid, *the plaint and proceedings should be set aside, reversed, annulled, and altogether held for nothing*, and that the court there *would take no further cognisance of the plaint and proceedings, &c.*: and thereupon accordingly the plaint and proceedings were by the said court *set aside, reversed, annulled, and altogether held for nothing*; and that, notwithstanding the proceedings had on the plaint, and the said order and judgment of the court, a general customary court baron of the lord of the manor was holden in and for the same manor, before the said steward of the manor, in obedience to the writ of mandamus, on 24th October, 1838, and the homage sworn were J. K. and R. P.; and, at the same court, on that day, came the said T. B. by his said alleged attorney, in the said writ mentioned; and thereupon also the said N. T. came by his attorney in the said writ mentioned, against the said T. B., in the plea of land in the said writ mentioned; and the said R. M. also came in his own proper person against the said T. B. in that plea: and the said N. T. and R. M. said that the said court ought not further to take cognisance of, or proceed upon, the plaint in the said writ mentioned. First, because they said that, in making of the plaint, and in the proceedings aforesaid, there was an error and irregularity in this, to wit, that the said Thomas Blundell was not, at the time of the entering of the plaint, or the receipt thereof by the steward, or the enrolment thereof as in the said writ of mandamus mentioned, nor was he then, a tenant of the manor, nor had he ever been admitted on the court rolls of the manor as tenant to the lord; and that that fact had been first discovered and ascertained by the said N. T. and R. M. since the holding of the court on 5th August; that there was also, as they had before alleged at the said court holden on 5th August, 1835, &c. (repeating, secondly, and thirdly, the objections urged at the former court); and, fourthly, because it was considered and adjudged by the said court, so holden on 5th August, 1835, that the plaint and proceedings under the same should be, and the same were then, by the said court, *set aside, reversed, annulled, and altogether held for nothing*, and the said court then considered and adjudged that they could take no further cognisance of the said plaint and proceedings; and the said N. T. and R. M. prayed that the plaint and proceedings aforesaid, for the errors and irregularities, and reasons aforesaid, and other errors in the proceedings aforesaid, might be held altogether for nothing, and that the said court would not take further cognisance of the said plaint and proceedings, or further proceed therein. Whereupon, the matters aforesaid above alleged by N. T. and R. M. being seen, and by the said court, so held on 24th October, 1838, understood, and deliberation being thereupon had, *it appeared* to that said court that in the making of the plaint aforesaid, and in the proceedings aforesaid, there was manifest error, and also that the court *ought not to take further cognisance of the plaint and proceedings, or further proceed therein*. Therefore it was *considered and adjudged*, by the court so held on 24th October, 1838, that, for the errors aforesaid, firstly, secondly, and thirdly above alleged, *the plaint and proceedings aforesaid were rightly set aside, reversed, annulled, and held for nothing at the court so held on 5th August, 1835, as aforesaid*; and it was also *considered and adjudged* by the court that, for the errors and reasons aforesaid, they *ought not and could not, according to law and the practice of the said court baron, take further cog-*

nizance of the said plaint and proceedings, or further proceed therein. Wherefore, for the reasons above alleged, the lord and steward could not, nor could either of them, proceed upon the said plaint, as by the said writ they were commanded.

Stephen, Serjt., now moved (on concilium) that the return might be quashed and a peremptory mandamus awarded. First, the return is repugnant and contradictory. The writ commands the lord and steward to proceed upon the plaint, or to show cause for not doing so. The return sets forth, apparently, a cause for the court not proceeding, yet states that the court did proceed. If the plea, in the first instance, was rightly "altogether held for nothing," the return is contradictory in stating that the court afterwards gave judgment upon it. This objection is not answered by saying that the allegation as to the proceedings subsequent to the writ of mandamus is redundant: the defendants ought not to embarrass the record by matter which makes it impossible for the prosecutor to plead, or to know what it is that he has to answer. In *Regina v. Mayor &c. of Norwich*, 2 *Ld. Raym.* 1244, the mandamus was to admit one Dunch, an alderman; the return alleged that he was elected alderman, but that the mayor and aldermen (having power so to do, as shown in the return) refused him for not having received the sacrament within a year before his election; and, at the end of the return, it was averred *quod non fuit electus*. It was admitted that, upon the matter shown, the election was void, and that the return, if confined to that, would have been good. "But in regard the return was repugnant and contradictory, the court granted a peremptory mandamus. The Chief Justice said, the court could not believe them, when, by their return, first they admit an election and avoid it, and then deny that Dunch was elected." And *POWELL, J.*, said, "If the return be not contradictory, it is very inveigling; the court cannot tell what to rely upon." And, upon *POWERS, J.*, doubting whether, since it appeared that the election was void, a peremptory mandamus could be granted, "the Chief Justice said it did not appear; for the court could not tell what to believe, when the return was contradictory to itself." The court awarded a peremptory mandamus. This case was cited in *Rez v. The Mayor of London*, 9 *B. & C.* 1, (17 *E. C. L. R.*.) and the court there said, "It was contended that the return was inconsistent: if we were of that opinion, then the return ought to be quashed."

Secondly, (a) it was not necessary, at any rate so far as regarded this suit, that the prosecutor should have been admitted tenant. As to this, he cited *Co. Comp. Cop. s. 41*, (p. 94; ed. 1764;) *Calthorp's Readings*, 63, (ed. 1635;)(b) *Gilbert on Tenures*, 282, 283; 1 *Rol. Abr.* 505, *Copyhold*, (X.,) (Y.;) *Gyppyn v. Bunney*, *Cro. Eliz.* 504, *Yearb. Tr.* 38, *Ed. 3*, fol. 13, A., B.(c)

Thirdly, the prosecutor might appear by attorney. As to this, he cited the statute of Westminster the second, 1 *stat. 13 Ed. 1*, c. 10; *Com. Dig. Attorney*, (B 5;) *Jacob's Comp. Court Keeper*, 215, 227, (8th ed.;) *Practice of Courts Leet, and Courts Baron*: published from the Manuscripts of Sir William Scroggs, 196, (4th ed.;) *Co. Comp. Cop. s. 35*, (p. 80; ed. 1764;) *Kitchin on Courts Leet, &c.*, 511, 512, (5th ed.;) *Fitzherb. Nat. Brev.* 11 *N.*, 26 *D.*; and he stated that in *Angell*

(a) The judgment of the court renders it unnecessary to give the arguments, at length, upon any besides the first objection.

(b) "The relation between the lord of the manor and the copyholder his tenant."

(c) On this point, *Littledale, J.*, referred to 1 *Soriv. Cop.* 376, (3d ed.)

v. *Angell*, 3 Bing. 393, 397, (11 E. C. L. R.,) both parties appeared by attorney.

Fourthly, it was not necessary that the warrant of attorney should be entered. As to this, he cited Yearb. Pasch. 4 Ed. 4, fol. 13 A. pl. 21; Com. Dig. *Attorney*, (B. 8;) *HOLT*, C. J., in an *Anonymous* case, 1 Salk. 86, (pl. 3,) 3 Vin. Abr. 295, *Attorney*, (I.)

Cresswell, contra. First, the grounds alleged are not repugnant, as in *Rex v. Mayor &c. of Norwich*, 2 Ld. Raym. 1244; the whole may be, and in fact is, true: and therefore the reason given for quashing the return in that case, that the court could not tell what to believe, does not apply here, since the court may, and on this return must, believe the whole. It would be otherwise if the return were contradictory, as the court said in *Rex v. The Mayor of London*, 9 B. & C. 1, (23 E. C. L. R.) But, as appears by the subsequent proceedings in *Rex v. the Mayor and Aldermen of London*, 3 B. & Ad. 255, (a) any number of consistent causes may be returned; and, if any one constitute a good answer, there will be no peremptory mandamus. Now here the court below, having already held the plaint to be merely null, met, in obedience to the writ of mandamus, and upon declaration, found themselves compelled to abide by their former holding. The plaint being at an end, they could not proceed, as is indeed argued on the other side. This they set out substantially; and there is no repugnancy in form or fact. Supposing the court to have decided erroneously, that is no ground for quashing the return; they might simply have returned that they had proceeded. In *Rex v. Richardson*, 1 Wils. 21, a mandamus went to two justices to proceed and give judgment in a complaint; they returned that they had heard and determined the complaint; and the return was allowed. So in *Rex v. The Justices of The West Riding of Yorkshire*, 7 T. R. 467, where the writ commanded the defendants to give judgment, and they returned a judgment which, it was contended, was imperfect, the court allowed the return, saying that, even if the judgment below was erroneous, that was not the proper mode of correcting the error, but that the prosecutor must bring a writ of error. Here, if a peremptory mandamus were to issue, the defendants have not the means of obeying it, judgment having been already given.

(He then argued the other points; citing, on the second, *Doe dem. Tofield v. Tofield*, 11 East, 246.)

Stephen, Serjt., in reply. The decision in *Rex v. Mayor, &c., of Norwich*, 2 Ld. Raym. 1244, does not proceed on so narrow a ground as that suggested on the other side: the Court there appear to have considered that the different ways of stating the legal result made it impossible for them to see on what the defendants meant to rely. And, although they say that a peremptory mandamus must go where the Court cannot tell what they are to believe, they do not say that it shall not go in any case where they do know what to believe. But, further, in the present case the Court cannot know whether the suit was at an end on the 5th of August or not. If the return were simply as in *Rex v. Richardson*, and *Rex v. The Justices of the West Riding of Yorkshire*, the objection would not arise: for in those cases there was a substantive judgment set out as the sole answer to the writ; so that there was a remedy by the regular method of correcting the judgment. Here the words "considered

and adjudged" are not enough to make a regular judgment: there should be a judgment that the demandant take nothing and the tenant go quit.

LORD DENMAN, C. J. The first objection to this return is, that it is repugnant and contradictory. I cannot see that it is so. Upon the mere reading of the return, it is clear that the Court intended to pronounce a judgment; and what they pronounced was a judgment. It is, however, said that the plaint was revived. But the prosecutor cannot complain of the question having been again entertained upon his own demand. The defendants might, indeed, have returned that they had already heard: but, if they choose to hear again and confirm what they did before, that introduces no contradiction; and the case does not fall within *Rez v. Mayor, &c., of Norwich*, 2 Ld. Raym. 1244. Then what more has this Court to do? The defendants say that they have done what we require them to do: and the question, whether or not what they have done be erroneous, cannot be entered into in this proceeding. We cannot tell that, if they were ordered to act again, they would not act as before. We do not sit here as a court of error. The return is therefore, in my opinion, perfectly good.

LITTLEDALE, J. I also am of opinion that the return is sufficient. As to the question of repugnancy, I think it is as plain as possible. A proceeding takes place in August 1835, when an objection is made to the prosecutor's suit, which the manor court hold to be valid. Then the prosecutor comes here for a mandamus, directing the manor court to proceed. In obedience to the mandamus, a manor court is held in October. Now that proceeding could not be like entertaining a plaint *de novo*; for they are commanded to proceed on the original plaint. Several objections are taken in the manor court; and that court, on the old and new objections, confirm what they had before done, and say that they can proceed no farther. The defendants, therefore, have held a Court, have heard the parties, and have given judgment. What is this Court to do? The defendants have not refused, but have obeyed by hearing and adjudging. I say nothing of the way in which the judgment is entered up; we have nothing to do with that. If it be erroneous, there may be some equitable or other remedy. Nor do I decide on the answer given here to the objections. We have nothing to do with them now: it is sufficient that the manor court has adjudicated.

PATTESON, J. I have no difficulty in understanding this return; and I see neither repugnancy nor contradiction in it. It states the determination which the manor court came to upon attempting to continue the proceedings. What they mean I can understand; though I have more difficulty in understanding the proceedings themselves. I do not know whether there was a plea or an assignment of errors: but it is clear that what was done was meant for a judgment. That may be bad in form and substance: but we are not a court of error; nor, if we were, do I know that we could quash the judgment in this proceeding.

WILLIAMS, J. It is suggested that there is a repugnancy in the return, because it shows that, the proceedings having been received, the manor court came to the same judgment as before. But the mandamus called on them to revive the proceeding; and they have come to a determination which they think final. Whether that be formal or informal I do not say; neither is it material. My brother *Stephen* appears to admit that, if the return show an actual judgment, it is

enough: which indeed appears from *Rex v. The Justices of the West Riding of Yorkshire*, 7 T. R. 467, and *Rex v. Richardson*, 1 Wils. 21.

Return confirmed.

The QUEEN against The Guardians of the Poor of the WALLINGFORD Union, in the Counties of BERKS and OXFORD.—p. 259.

The guardians of an union formed under stat. 4 & 5 W. 4, c. 76, s. 26, comprehending the parish of M. and others, built a workhouse in M., for the employment of the poor, under stat. 4 & 5 W. 4, c. 76, s. 23.

Held, that the guardians were rateable in the parish of M., as occupiers of the workhouse.

Though it was built on land which, from the nature of the former occupation, had not previously been rated.

ON appeal against a poor rate, made 4th January, 1838, whereby the appellants were rated in the respondent parish to the relief of the poor, the sessions confirmed the rate, subject to the opinion of this Court on the following case.

On the hearing of the appeal, it was proved that the respondent parish and twenty-eight other parishes together form one union (pursuant to the provisions of stat. 4 & 5 W. 4, c. 76,) called the Wallingford Union, formed by the Poor Law Commissioners on 2d June, 1835; and that the appellants are the guardians thereof, elected pursuant to the said statute.

That the property, in respect of which they are sought to be rated, consists of the union workhouse of the said union, with its appurtenances, together with two acres of ground, used as a garden to the workhouse, and adjoining the same, but not being a distinct property.

That, previously to the formation of the union, the respondent parish, together with the parishes of St. Peter and St. Leonard, in the borough of Wallingford, were jointly possessed of a workhouse for the reception of the paupers of the said three united parishes, on the site of which the said union workhouse has been erected in manner hereinafter mentioned. That, after the formation of the Wallingford Union, the old union of the said three united parishes was declared void by the Poor Law Commissioners; and the old workhouse, belonging to the three united parishes, was, with the concurrence of the Poor Law Commissioners, and in pursuance of stat. 4 & 5 W. 4, c. 76, and of stat. 5 & 6 W. 4, c. 69, ("to facilitate the conveyance of workhouses and other property of parishes and of incorporations or unions of parishes in England and Wales,") sold by the visitor and guardians of the said three united parishes, and, with the like concurrence of the commissioners, purchased by, and conveyed to, the guardians of the Wallingford Union. That a piece of ground, containing about two acres, adjacent to the said workhouse, was also purchased by the guardians for the sum of 190*l.* 10*s.*, and conveyed to them, by the order and direction of the commissioners, and in pursuance of the said statutes. That the union workhouse was erected, partly on the ground belonging to the old workhouse, and partly on a portion of the said two acres of ground, by the guardians, at the cost of 5150*l.*; including the said sum of 190*l.* 10*s.*, under the like order and directions, and with the approbation, of the commissioners. That the old workhouse was not rated to the re-

lief of the respondent parish; but that the said two acres of land were rated to the relief of the poor of the said parish before the formation of the union; but the produce thereof is now applied to the maintenance of the pauper inmates.

That the union workhouse is situate in the respondent parish. That it is applied solely to the reception and maintenance of the poor of the union, including therein as well poor persons falling sick or otherwise becoming destitute in the union, although not settled therein, as the settled inhabitants of the union.

That, in addition to the apartments occupied by the poor persons received into the union, and appropriated solely to their use, the building also contains apartments occupied by the master and matron; but that such apartments are necessary for the purposes of the union, to carry on the work of the union, and to superintend the paupers belonging thereto.

That the union workhouse also contains a board-room, where the guardians meet-once in every week, in order to transact the business of the union, and which is used solely for that purpose.

That the union workhouse contains a mill affixed to the freehold, whereat the pauper inmates are employed to grind flour for hire; but that only four men can work at the mill at the same time; and, also, that all the money so earned is solely applied in discharge of the ordinary expenses of the workhouse, and the maintenance of the paupers therein.

That a piece of garden ground is attached to the union workhouse, and cultivated by the paupers who are inmates of the house; but that its produce is consumed by the pauper inmates of the union workhouse.

That the names of the occupiers of the union workhouse are described in the said rate in these words, viz., *Board of Guardians of Wallingford Union*. That the name of the owner is described in the said rate in these words, viz., *Parishes comprising the union*. That the premises intended to be rated are described in the said rate in these words, viz., *Union workhouse, board-room, officers' apartments, yard, garden, and premises*.

The question for the opinion of the Court was, whether the union workhouse and premises, or any of them, were, under the circumstances, liable to be rated to the relief of the poor in the respondent parish or not.

The case was now argued.(a)

Talfourd, Serjt., *Carrington*, *Bros*, and *M. Smith*, in support of the order of sessions. By stat. 43 Eliz. c. 2, s. 5, churchwardens and overseers are empowered to build, within their own parish, houses of dwelling for the impotent poor. And by stat. 9 G. 1, c. 7, s. 4, they may purchase or hire houses in their own parish for workhouses; or parishes may unite for the purpose, in which case the workhouse need not be in any of the united parishes; *Rex v. St. Peter and St. Paul, in Bath*, Cald. 213. Neither of these statutes contains any provision with respect to the rates of such houses. Then stat. 22 G. 3, c. 83 (Gilbert's Act), which created the guardians for united parishes, and (by sect. 21) incorporated them, enables the guardians to provide houses; and, by sect. 18, it is enacted that the houses shall be in the parish, if they be for one parish only, or, if they be for several united parishes, then in one of such parishes, unless consent to a different arrangement be given

(a) Before Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

as there provided: and, by sect. 5, no united parish is to be more than ten miles from the house. By sect. 19, "such houses, buildings, and lands, shall be free from all parochial and parliamentary taxes, except such taxes, and to such amount, as they were assessed at the time they were first taken and applied to the purposes" of the act. If, therefore, the premises in question in the present case had been taken by parishes united under stat. 22 G. 3, c. 83, the rate would have been merely as before the taking. Then, by stat. 4 & 5 W. 4, c. 76, s. 26, unions are provided for on a larger scale and for extended purposes. The twenty-third and following sections enable the commissioners, under certain prescribed limitations, to direct the overseers or guardians of a parish or union to build, purchase, hire, enlarge, &c., workhouses, without any restriction as to place; and sect. 31 repeals sect. 5 of stat. 22 G. 3, c. 83, and sect. 1 of stat. 56 G. 3, c. 129, which imposed such restrictions. Now the Court will not interfere with the discretion of the commissioners in this respect; *Rex v. The Poor Law Commissioners, In the matter of the Newport Union*, 6 A. & E. 54, (83 E. C. L. R.): and, if such property were not rateable when situated out of the parish for which it was taken, it would at any time be in the power of the commissioners to exempt property from rateability. This case must be governed by the decision in *Governors of the Bristol Poor v. Wait*, 5 A. & E. 1, (31 E. C. L. R.) There the occupation was as much for a public purpose as here. The objection to the rate there was grounded on the occupation being for a public purpose; but the answer given was that, wherever it was attempted to exempt property from its prima facie liability to rate on account of its being devoted to a public purpose, it was necessary to show that there was no occupation by the party rated, as where the crown, by its servants, occupies merely as a trustee for the public of the whole kingdom. The mere absence of profit to the particular party does not exempt from rate; *Rex v. St. Giles, York*, 3 B. & Ad. 573, (23 E. C. L. R.) The present case cannot be distinguished from *Governors of the Bristol Poor v. Wait*, on the ground that the property there was situated without the parish for which it was taken, but here is within the union; that rule, as before pointed out, would enable the commissioners always to exempt property from rateability. But, even if that distinction were important, it affects only one of the twenty-nine parishes of the union, and therefore goes only to amount, the union being beneficial occupiers in respect of twenty-eight parishes, each of which, by stat. 4 & 5 W. 4, c. 76, s. 26, is separately chargeable for its own poor. The respondent parish would be unequally rated, if a part of the property within it were exempted from contributing to the particular parish on the ground of a benefit diffused among all the twenty-nine. Stat. 22 G. 3, c. 83, s. 19, recognises the general liability to rate by the language of the express partial exemption. The occupation here is not for a public purpose in any sense in which the occupation of a railroad or dock is not so. Such occupation has never been held to create an exemption, except where the freights have been applied exclusively to a specific public purpose by express parliamentary provision; as in *Rex v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730, *Rex v. Liverpool*, 7 B. & C. 61, (14 E. C. L. R.), *Rex v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, note (c), *Rex v. The Commissioners for lighting Beverley*, 6 A. & E. 645, (33 E. C. L. R.) *Regina v. The Mayor &c. of Liverpool*, 9 A. &

E. 435, (36 E. C. L. R.,) S. C. 1 P. & D. 384. Occupation exclusively for religious or charitable purposes forms a distinct ground of exemption; but the occupation for the employment of the poor is not a charitable purpose, as appears from *Governors of the Bristol Poor v. Wait*, 5 A. & E. 1, (31 E. C. L. R.)

Sir J. Campbell, Attorney-General, *W. J. Alexander*, and *Tyrwhitt*, contra. The hardship upon the respondent parish, if any, could not vary the law; but, in fact, there is here no such hardship, the workhouse never having been previously rated. The guardians here are not inhabitants; they must be rated, if at all, as occupiers, under stat. 43 Eliz. c. 2, s. 1, the union not being under stat. 22 G. 3, c. 83. They are now a corporation by stat. 5 & 6 W. 4, c. 69, s. 7. The criterion suggested on the other side, of application of the funds under statute, will not account for all the cases, as *Lord Amherst v. Lord Sommers*, 2 T. R. 372, (recognised by Lord KENYON in *Eckersall v. Briggs*, 4 T. R. 6.(a)) *Holford v. Copeland*, 3 B. & P. 129, *Rex v. Woodward*, 5 T. R. 79. But in fact the occupation here is for a public purpose; and the property is used exclusively for purposes defined by statute, as in the cases cited on the other side. The provisions of stat. 4 & 5 W. 4, c. 76, control the purposes to which this property can be applied. Sect. 15, &c., give to the orders of the commissioners the effect of laws; and by sect. 21 of those orders(b) the relief to be given to the paupers is under strict regulations. The present case is not like that of a hospital established or supported by voluntary charity, where there could be no claim of exemption which might not be urged by any person who chose to devote his house to the entertainment of persons in want. Thus in *Rex v. St. Giles, York*, 3 B. & Ad. 573, (23 E. C. L. R.,) *Rex v. Agar*, 14 East, 256, and *Rex v. The Mayor, &c., of York*, 6 A. & E. 419, (33 E. C. L. R.,) the particular application of the funds was voluntary. The cases upon occupation for public purposes were expressly recognised in *Governors of the Bristol Poor v. Wait*, 5 A. & E. 1, (31 E. C. L. R.,) and they have lately been upheld in *Regina v. The Mayor, &c., of Liverpool*, 9 A. & E. 435, (36 E. C. L. R.,) The rateability attaches, as was said in *Governors of the Bristol Poor v. Wait*, "so soon as any independent occupation for private advantage is discoverable." That was the case in *Eckersall v. Briggs*, 4 T. R. 6, and *Rex v. Terrott*, 3 East, 506. Here no such occupation can be shown. With respect to *Governors of the Bristol Poor v. Wait*, if that case were reconsidered, it might be urged that important points, which were relied upon in argument by the unsuccessful party, were not noticed in the judgment of the Court. It may, however, be distinguished from the present. The application of the property to the employment of the poor was there perfectly voluntary; the governors might have maintained the poor in any other way. Again, the Court there laid great stress upon a circumstance which does not exist here, namely, that the premises were not in the parish for which they were taken. *Rex v. The Commissioners for lighting Beverley*, 6 A. & E. 645, (33 E. C. L. R.,) was indeed decided partly on a principle which cannot be applied here, namely, that by rating the property the parish would lose as much as it could gain. But that circumstance did not exist in *Regina v. The Mayor, &c., of Liverpool*, 9 A. & E. 435, (36 E. C. L. R.,) which is precisely in point, as it was decided on the ground

(a) See p. 9.

(b) See Archbold on the Act for the Amendment of the Poor Laws, p. 179, (5th ed.)

that the funds were disposed of by statute for public purposes. And, in that case, the Court mentions the disturbance of the proportions to be contributed by different parishes as a difficulty which might arise, but which was not sufficient to control the rule. Besides, cases might be suggested where the rating such property would be wholly circuitous, as, if no other parish in the union had any paupers; and it must always be circuitous to some extent. It is true that a part of the property here was rated formerly. That, however, is not a circumstance which can impose a rateability in the present state of the property, as appears from Lord MANSFIELD'S judgment in *Rez v. St. Luke's Hospital*, 2 Bur. 1064, and from *Rez v. Waldo*, Cald. 358. *Cur. adv. vult.*

Lord DENMAN, C. J., in the following vacation, (June 20th, 1839,) delivered the judgment of the Court.

The question is, whether a workhouse, situate in one of many parishes which have been formed into an union, is rateable, in the hands of the guardians, towards the relief of the poor of the parish in which it is.

To show that it is not so rateable, the class of cases was referred to in which the Court has held property exempt from rating, by reason of its being wholly unproductive to the occupiers, commencing with *Rez v. Commissioners of Salter's Load Sluice*, 4 T. R. 730, and ending with the late decision in favour of the Corporation of Liverpool.^(a) The great leading principle of these cases we take to be this: that, when that person who must be deemed the actual occupier is merely a trustee for others, and is prevented by the law from deriving any benefit whatever from the occupation, that person cannot be considered as the occupier for the purpose of being rated; the act of Elizabeth plainly supposing both control over the property and the power of enjoying it.

Thus, in the *Salter's Load Sluice* case, where tolls were to be applied for the several purposes of the act, and for no other whatever, Lord KENYON said, "There is property, which is the subject of a rate: but no occupier of it." The Liverpool case^(b) may be considered as the same with that just cited, which it expressly follows; and the Weaver Navigation case^(c) in the same volume agrees with them entirely: *Rez v. Sculcoates*, 12 East, 40, fully acknowledges the principle, on which also we lately decided *Rez v. The Commissioners for lighting Beverley*, 6 A. & E. 645, and the very important case of *Rez v. The Mayor, &c., of Liverpool*, 9 A. & E. 435, (36 E. C. L. R.,) S. C. 1 P. & D. 334. Under the circumstances which appeared on all these occasions, there is no impropriety in saying that the public was the occupier, made such by act of parliament, and receiving by the same authority all the profits of the property; while those who would otherwise have been the occupiers are in the situation of public servants, receivers and managers for the public benefit, without any interest of their own. So it was argued here. The workhouse is hired by the guardians under authority of the late statute for the public purpose of maintaining the poor, and with no private advantage to the occupiers. But, though the maintenance of the poor be a public purpose, the maintenance of the poor of this particular district is a burden on that district alone; the occupation is not beneficial to the guardians individually; but the most advantageous mode of relieving

(a) *Regina v. The Mayor, &c., of Liverpool*, 9 A. & E. 435, (36 E. C. L. R.)

(b) *Rez v. Liverpool*, 7 B. & C. 61, (14 E. C. L. R.)

(c) *Rez v. The Trustees of The River Weaver Navigation*, 7 B. & C. 70, note (c), (14 E. C. L. R.)

their poor is an advantage to that body. We decided accordingly in *Governors of the Poor of Bristol v. Wait*, 5 A. & E. 1, (31 E. C. L. R.), which can only be distinguished from the case before us by the local situation of this property, which is within one of the parishes composing the union. But one parish is not more a separate body from another than the parish of Saint Mary the More, in Wallingford, is from the union which annexes it to twenty-eight other parishes.

It is not necessary to make any observation on the intermediate cases of property voluntarily appropriated to religious and charitable purposes. We decide on the ground that this property, not being devoted to a public purpose, and being beneficially occupied, is subject to the poor-rate.

Order of sessions confirmed.

The QUEEN against The Inhabitants of CAVERSWALL.—p. 270.

A settlement cannot be gained under 6 G. 4, c. 57, by renting and occupying a tenement jointly with another person.

ON an appeal against an order of removal from the parish of Burslem, in the county of Stafford, to the parish of Caverswall in the same county, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

It was admitted on the part of the appellants that the pauper's late husband was settled in the parish of Caverswall, at the time he went to reside in the parish of Burslem. It was admitted on the part of the respondents that the said husband, during the years 1828, 1829, 1830, 1831, rented, bona fide, a dwelling-house in the parish of Burslem at the rent of 7*l.* a year, and occupied and paid the rent and poor's rates for the same during the whole of that time under that renting; and that, during all the time he so rented and occupied the said dwelling-house, he also rented, bona fide, a building called a Potwork, or some other building, jointly with one E. A. in the same parish, from another landlord, at the rent of 15*l.* a year and upwards, and occupied the same jointly with the said E. A. under such renting, and paid a moiety, at least, of the rent and poor's rates, due for the same, during the whole of that time.

The question for the consideration of the Court was, whether, under the circumstances above stated, the pauper's husband, and from him the pauper herself, had acquired a settlement in the parish of Burslem under 6 G. 4, c. 57.

F. V. Lee, in support of the order of sessions. Supposing that two tenements in the same parish may be joined for the purpose of giving a settlement within 6 G. 4, c. 57, as to which *Rex v. Iver*, 1 A. & E. 228, (28 E. C. L. R.) must perhaps be regarded as decisive, (though the language of TAUNTON, J., in *Rex v. Macclesfield*, 2 B. & Ad. 873, (22 E. C. L. R.) points the other way,) still there is no authority to show that an occupation jointly with another person is enough to satisfy the words of the statute. The expression, "separate and distinct" dwelling-house or building, means separate and distinct as regards other persons; and this construction has been put upon it by PATTESON and WILLIAMS, Js., in *Rex v. Wootton*, 1 A. & E. 232, (28 E. C. L. R.) and again by

PATTESON, J., in *Rex v. Great and Little Usworth and North Biddick*, 5 A. & E. 261, (31 E. C. L. R.)

Wheateley, contra. That the tenements may be united is settled by *Rex v. North Collingham*, 1 B. & C. 578, (8 E. C. L. R.,) *Rex v. Stow*, 4 B. & C. 87, (10 E. C. L. R.,) *Rex v. Tadcaster*, 4 B. & Ad. 703, (24 E. C. L. R.,) and *Rex v. Iver*. As to the joint occupancy, the dicta of PATTESON and WILLIAMS, Js., in the cases cited were not necessary for the judgments given in them; nor does the language of the former strictly apply to this case. PATTESON, J., there seems to refer to the case of a lodger or person occupying only part of a house. In *Rex v. Great Wakering*, 5 B. & Ad. 971, (27 E. C. L. R.,) a joint renting was held insufficient only because the entire value of the tenement was not large enough to admit of being divided between two: if it had been worth 20*l.* a year, it is evident that the Court was prepared to hold the occupation sufficient. *Rex v. Kniveton*, 2 Bur. S. C. 499, is also in favour of the settlement; for the statute 6 G. 4, c. 57, makes no difference in this respect.

Lord DENMAN, C. J. None of the authorities are exactly in point; but I have no doubt upon the construction of the act. It requires the party to have the house or building separately to his own use, and not jointly with any one else. He must be the sole occupier.

LITLEDALE, J. The statute evidently contemplates sole occupancy. It would occasion difficulties, if several could claim a settlement by a joint occupation of the same tenement under its provisions.

PATTESON and WILLIAMS, Js., concurred.

Order confirmed.

The QUEEN against PITT.—p. 272.

Under stat. 11 G. 4 and 1 W. 4, c. 60, s. 8, the Court of Chancery, upon the Master's report, made an order declaring that the heir of W., legal tenant in fee of copyhold premises, could not be found, that W. held as trustee, and that B. was entitled to the equitable fee; and appointing G. trustee to convey or surrender the legal estate.

This court refused to compel the lord, by mandamus, to accept G.'s surrender, on the ground that (assuming the statute to apply to copyholds) the Court of Chancery could compel the performance of whatever was requisite, and was better able than this court to regulate the rights of the parties.

Especially as it appeared that B.'s right was disputed, and that the lord had seized quousque and assigned for a valuable consideration.

MAULE had obtained a rule in Trinity term, 1838, calling on the lord and steward of the manor of Minty, in Gloucestershire, to show cause why a mandamus should not issue, commanding them, or one of them, to accept the surrender of Richard Goodrich of certain customary or copyhold hereditaments within the said manor.

From the affidavits in support of the rule it appeared that, by an order of the Court of Chancery, dated 27th March, 1835, on the petition of Sir Henry Loraine Baker, Bart., it was referred to the Master to inquire and state to the court whether John Wade, deceased, was a trustee of the legal estate in the one-sixth part of the copyhold hereditaments in question, within the meaning of stat. 11 G. 4 & 1 W. 4, c. 60; (a)

(a) "For amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees; and for enabling courts of equity to give effect to their decrees and orders in certain cases."

and, if the Master should find that he was such trustee, then it was ordered that he should inquire and state to the Court who was his heir at law, or whether it were unknown or uncertain whether such heir were living or dead; and, in case the Master should find that it was unknown or uncertain, &c., then it was ordered that he should approve of some proper person to be appointed in the stead of such heir at law to convey the legal estate in the said one-sixth part. That the Master made his report, dated 15th November, 1835, certifying that he had been attended by the petitioner's solicitor, and had proceeded, &c. The report of the Master was then stated, which set out the evidence laid before him, the result of which was that John Wade was admitted to hold the whole of the copyhold premises to him and his heirs for ever, according to the custom of the manor; that he afterwards surrendered to the use of his will: that, by a memorandum endorsed on the copy of court-roll, dated 16th July, 1788, he declared that, as to one-sixth part, he was only trustee, and that this part belonged to Mary Storke, for her life, and, after her death, to the right heirs of her deceased husband, Samuel Storke. That John Wade died, having duly made a will and codicil, without disposing of the legal estate in the said one-sixth part: that thereupon the legal estate in the same vested in his customary heir at law *ex parte materna*. The report then deduced the title to the equitable fee in the one-sixth part to Sir H. L. Baker, the petitioner. That the heir of John Wade, *ex parte materna*, could not be found. That the Master then found that John Wade was a trustee of the one-sixth part within the act; that it was not known or discovered who was his customary heir; and that, the petitioner (Sir H. L. Baker) having proposed R. Goodrich as a trustee instead of such heir, he, the Master, approved of R. Goodrich as a proper person to be appointed instead of such heir to convey or surrender the legal estate in the one-sixth part. The affidavits further stated that the Master of the Rolls, by order of January 21, 1836, confirmed the Master's report, and ordered that R. Goodrich should be appointed trustee, instead of the customary heir of John Wade, to convey or surrender the legal estate of the one-sixth part pursuant to the act.

The affidavits also stated that proclamation was made at three successive general courts *halimot* or courts *baron* of the manor, in 1818, 1819, and 1820, for the customary heir of John Wade to appear and be admitted tenant of the one-sixth part, and, he not appearing, the lord of the manor seized the one-sixth part into his hands *quousque*.

The petitioner, Sir H. L. Baker, stated, on affidavit, his claim to the beneficial interest in the one-sixth part, as customary heir at law of, &c., (according to the title deduced in the Master's report;) and that, since the order, he had applied to the steward to appoint a court for admitting R. Goodrich, in order to his surrendering; but that the steward had not appointed the court. Details as to the application and refusal to appoint the court, and of an application and refusal to accept Goodrich's surrender, were also given, which it is not necessary to set forth here.

The affidavits in answer stated that the order of reference to the Master, the Master's report, and the order of the Master of the Rolls, were obtained *ex parte*; that the defendants had no evidence of Sir H. L. Baker's title, and did not believe that he had one. Details as to this were added, and also some statements qualifying the supposed de-

mand and refusal.(a) Also that, since the seizure by the lord, he had granted away, for a valuable consideration, part of the said copyhold lands, which part was still vested in the grantee or his assignee.

Kelly now showed cause. This application is founded on stat. 11 G. 4 & 1 W. 4, c. 60, the title of which shows that the object was to give jurisdiction to the Court of Chancery; and sect. 8,(b) upon which the rule is framed, applies only to cases where there is no question as to the party having the beneficial interest, and, in those cases, enables the Court of Chancery to give such party the means of calling in the legal estate. Here there is a dispute as to the equitable title of the petitioner; and the Master's report was merely upon ex parte evidence. This Court is, therefore, practically required to give the petitioner the equitable estate, though he may have no title, at any rate none known to this Court. The remedy for the petitioner, if any, is in chancery. If the estate were freehold, that Court would direct the conveyance; it may, therefore, direct the proceedings of the copyhold court here, if the section applies to copyholds at all. That, however, may be questioned. It contains no mention of admittance or surrender; and it simply authorizes the party appointed in lieu of the trustee to convey. In the interpretation clause, sect. 2, it is enacted that the provisions relating to land shall extend to and include "any manor, messuage, tenement, hereditament, or real property, of whatever tenure;" but that does not go the length of giving the appointed trustee all the rights of a copyhold tenant. The lord is entitled to refuse the surrender of any party who has not been admitted. [LITTLEDALE, J.—In 1 Scriven on Copyholds, 7, 3d ed., it is said, "Special customary courts are also sometimes called for the purpose of effecting the proposed transfer of copyhold property by the admission of the new tenant, (the purchaser, or mortgagee, or, perhaps, trustee for particular objects,) but at such courts it is not regular to enter any presentment, or make any proclamation in furtherance of the acts of any prior general court." Can the lord be compelled by mandamus to hold such a special court?] Here, also, the lord having, as he was entitled to do, seized quousque, and sold a part, the rights of parties will be complicated; and interests will arise which a court of chancery is more competent to regulate than a court of common law.

Cresswell and *Whatley*, contra. The rule is properly framed; for, till the surrender has taken place, the surrenderee cannot be admitted, as there will be another tenant on the roll. The interpretation clause, sect. 2, is intentionally so worded as to include copyhold as well as other

(a) Some arguments as to the sufficiency of the demand and refusal are omitted in this report, the judgment of the court having proceeded on another ground.

(b) Which enacts, "That where any person seised of any land upon any trust shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid be living or dead, or, if known to be dead, it shall not be known who is his heir; or if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same; then and in every or any such case it shall be lawful for the said Court of Chancery to direct any person whom such court may think proper to appoint for that purpose in the place of the trustee or heir, to convey such land to such person and in such manner as the said court shall think proper; and every such conveyance shall be as effectual as if the trustees seised as aforesaid, or his heir, had made and executed the same."

tenures. [PATTESON, J., referred to the language of stat. 4 & 5 W. 4, c. 23, s. 6.] No objection can now be taken to the result of the Master's report, confirmed by the Court of Chancery: it must be assumed that all was properly done. Then the Court of Chancery has merely to name a party to take the place of the heir: this Court must treat the rights of such nominee as they would have treated those of the heir: the nominee is a sort of heir special. Now, the heir may surrender without admittance, though a surrenderee cannot. The trustee, when invested with his full legal rights, could be directed to act, by the Court of Chancery, under sect. 11; but this Court will compel the lord to allow to the heir special whatever the heir would have been entitled to demand. If it be said that the Lord Chancellor has power to direct the lord, independently of the statute, the remedy now sought is at all events the simplest.

LORD DENMAN, C. J. This is a motion for the purpose of carrying into effect the provisions of stat. 11 G. 4 & 1 W. 4, c. 60, s. 8. That section enables the Court of Chancery to appoint a person to make a conveyance in the place of the trustee or heir. It is said that sect. 2 shows that the statute applies to copyholds; and that, as the proper conveyance of a copyhold is by way of surrender, the lord should be compelled to accept the surrender. If that be so, I cannot see why the Court of Chancery has not the power to do what is now asked for. We are not to intrude our jurisdiction into a case where the Court of Chancery has already acted, and has power to go on; but should leave that Court to do what the act enables it to do, which comprehends all that is necessary for carrying into effect the substitution of a person for an heir not found. Even if the word "convey" did not occur in sect. 8, yet it would follow, from the general jurisdiction of the Court of Chancery, that, when an act enables them to appoint the substitute, they may do all necessary to give effect to the appointment. We therefore ought not to interfere, but to leave the matter to that jurisdiction which is here more capable than we are to do justice, more especially in a case where the lord sets up an interest, and there are disputed rights into which we cannot satisfactorily examine.

LITLEDALE, J. It is only of late that this Court has interfered by mandamus to compel the lord of the manor to admit a copyholder. In *Rex v. Rennett*, 2 T. R. 197, the Court, though it refused the mandamus in the particular case, said they would grant it if a proper case were laid before them; and *Rex v. The Borough of Midhurst*, 1 Wils. 283, is referred to in the report, which, however, was not the case of a mandamus commanding the lord of the manor to admit a tenant. The Court of Chancery has, however, original jurisdiction. This is an application to compel the lord to accept a surrender. It is said, in 1 Scriven on Copyholds, 623, &c., 3d ed., that it was doubted whether a lord was compellable by mandamus to accept a surrender; but he shows that such a mandamus lies. However, the Court of Chancery having original jurisdiction, (a) we think this a much fitter case for that Court than for us, in order that it may carry into effect the purposes of the act. It can call all the parties before itself. Here, the lord has seized, which creates our difficulty. Then, if the person appointed be an heir special, it may be said that there should be a finding by the homage. The whole proceeding is anomalous, and much fitter for the Court of Chancery than for us.

(a) See 1 Scriv. Cop. 631, (3d ed.)

PATTESON, J. We are asked to consider Goodrich as heir at law : if he be not, we have no power to interfere. The remedy by mandamus to compel a lord to admit is comparatively modern ; and I cannot find that it was ever exercised except in favour of an heir or tenant actually on the roll. A surrender by Goodrich would not effect the admittance of any one ; if the real heir surrendered, his surrenderee would still have to pay the fine. My difficulty, however, is in saying that we can look on Goodrich as the heir at law. If he be heir, it is only under the statute ; and then the case is peculiarly one of equity and trust, and especially within the cognisance of the Court of Chancery. We cannot see our way in the matter. There is no legal estate in Goodrich, except by the operation of the act ; but the act does not say that the person named shall have the same legal estate as the heir at law had, but only that his conveyance shall be as effectual as if executed by the actual trustee, or his heir. We cannot therefore act as we are asked ; the legislative provision does not go far enough for that purpose. But there is no want of remedy. The Court of Chancery has full power to do all that is requisite for giving the parties interested the benefit of the enactment.

WILLIAMS, J. The objection that one party was not heard has been answered : we must presume that the Court of Chancery acted rightly. But is there any ground for our interference ? The Court of Chancery has full jurisdiction to compel the performance of all that ought to be done.

Rule discharged.

The QUEEN against The Mayor, Aldermen, and Burgesses of the Borough of BRIDGEWATER.—p. 281.

A town council ordered a payment from the borough fund, for defraying the expenses of opposing two rules, one for a quo warranto against a party who had been declared duly elected a councillor and had accepted the office, for exercising that office ; the other for a criminal information against an alderman of the borough, for alleged misconduct at an election of councillors.

The payments were made by the treasurer, and his accounts audited. Afterwards, stat. 7 W. 4 & 1 Vict. c. 78 passed.

The court, under sect. 44, upon the affidavit of a burgess who applied in pursuance of the instructions of a subsequent town council, granted a certiorari to bring up the orders of the previous town council, and quashed them.

SIR W. W. FOLLETT had obtained a rule, in Michaelmas term, 1837, calling upon the defendants to show cause why a certiorari should not issue, directed to them, to remove certain orders or resolutions made at a meeting of the council of the borough of Bridgewater, holden 23d January, 1837, for defending, at the expense of the council, three rules nisi for quo warrantos severally against three persons named Champion, Bate, and Clark ; and for payment by the treasurer of the borough fund to Benjamin Lovibond of 100*l.* on account of the costs of defending the rules : Also certain other like orders or resolutions made at the same time for opposing, at the expense of the council, a rule nisi, calling on a person named Chapman to show cause why an information for misdemeanour should not be exhibited against him ; and for payment by the treasurer to Lovibond of 90*l.*, on account of the costs of defending that rule ; and all proceedings had thereon : Notice to be given to the council, or some of them, and to the town clerk and treasurer of the borough fund.

The rule was obtained on the affidavit of Matthew Paramore, who described himself therein as "gentleman, and one of the burgesses" of the borough of Bridgewater, and stated the following facts. In Michaelmas term, 1836, this Court granted rules nisi for quo warrantos against Champion, Bate, and Clark, for exercising the office of councillors of the borough, they having been declared to be duly elected at the election of November, 1836, and having accepted office; and also a rule nisi for a criminal information against John Chapman, a justice and alderman of the borough, for misdemeanours in his office of alderman.(a) On 23d January, 1837, two resolutions were passed by the town council: first, that the three rules for quo warrantos should be defended at the expense of the council; that Benjamin Lovibond, the attorney who had already conducted the defence, should be instructed to continue it; that the costs already incurred should be paid out of the borough fund; and that the treasurer should be directed to pay Lovibond 100*l.* on account of the costs: secondly, a similar resolution for opposing the rule against Chapman, and for paying 90*l.* in respect thereof. The treasurer afterwards paid the 190*l.* to Lovibond, for which, as the deponent was informed and believed, Lovibond had not accounted to the town council. The three rules for quo warrantos were afterwards made absolute, informations filed, judgments suffered by default, and judgment of ouster signed in all three cases. The rule against Chapman was discharged, on payment of costs to the prosecutor by Chapman.

In the affidavits in answer, it was deposed that the 190*l.* had been paid to Lovibond by the treasurer in January, 1837, after, and pursuant to, the resolutions: that the treasurer's accounts, containing items of these payments, were duly audited in March, 1837: that, in August, 1837, the treasurer resigned his office, and paid over the balance remaining in his hands to his successor: that the present application was made at the instance of the now town council, and at their expense, and under the direction of a committee appointed by them for the purpose, in pursuance of a resolution passed by the town council in November, 1837: that Paramore was an attorney, professionally engaged by that committee to conduct the present proceedings: and that, in December, 1837, the town council resolved not to oppose the proceedings.

In last Hilary term,(b)

Erle showed cause, on behalf of the party who was treasurer in January, 1837, and until August, 1837. First, this is an application by the town council for the purpose of defeating their own order; for, though the order was made in January, 1837, and the rule was obtained on behalf of a town council, which, as to some of the individuals, was new, in Michaelmas term, 1837, yet the body is legally the same. The town council is thus applying against itself. Secondly, no certiorari lies. Stat. 5 & 6 W. 4, c. 76, s. 132, enacts that no order made in pursuance of that act shall be removed by certiorari.(c) It is true that stat. 7 W. 4 & 1 Vict. c. 78, s. 44, enacts that, "whereas it is expedient to give all persons interested in the borough fund of every borough a

(a) In the second resolution of the council, afterwards mentioned, it was stated that these were "misdemeanours alleged to have been committed by him in discharge of his duty as the presiding alderman at the election of councillors" for one of the wards of the borough, in November, 1836.

(b) January 29th, 1839. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

(c) See *Regina v. The Justices of Rippon*, 7 Ad. & E. 417, (34 E. C. L. R.)

more direct and easy remedy for any misapplication of such fund," "any order of the council of any borough for the payment of any sum of money from or out of the borough fund of any borough may be removed into the Court of King's Bench by writ of certiorari, to be moved for according to the usual practice of the said Court with respect to writs of certiorari." But that act was passed 17th July, 1837; the orders in question were made on 23d January, 1837; and the treasurer's accounts were audited in March, 1837. The attempt is, therefore, to give a retrospective operation to stat. 7 W. 4 & 1 Vict. c. 78, s. 44, which contains no words to such an effect. Sect. 1 of the same act provides that nothing in the act shall extend to invalidate a payment bona fide made before its passing. Thirdly, the treasurer had no power to disobey the order of the council; and he is not now to be questioned for payments duly ordered, made, and allowed.

Sir *W. W. Follett*, contra. First, the case is precisely that which the legislature had in view in passing stat. 7 W. 4 & 1 Vict. c. 78, s. 44. Every burgess has a right now, to call in question orders for payments not made in pursuance of stat. 5 & 6 W. 4, c. 76, s. 92. The Court will not interfere with this right on the suggestion that the party is enforcing it at the instance of the town council. It is said that this is merely an application by the town council against itself; but the application is opposed by counsel instructed by parties opposing the town council. Secondly, sect. 44 of stat. 7 W. 4 & 1 Vict. c. 78, is, no doubt, as to the certiorari, prospective only, but it is not so confined as to the order which is the subject of the writ: "any order" may be removed by certiorari. The act will be construed liberally, having been passed to amend defects in the earlier act. The order complained of was illegal from the first; the remedy is certainly new, but nothing is made illegal which was previously legal; in which sense only the retrospective effect would be objectionable. Thirdly, it does not appear that the treasurer will suffer in any way by this rule being made absolute. [Lord DENMAN, C. J. What will you do with the order when you have it?] The parties may not be prepared to answer that question. [Lord DENMAN, C. J. The answer might guide us in the exercise of our discretion, if any is given to us. LITTLEDALE, J. It would be going a good way if the accounts were now to be reviewed.]

Lord DENMAN, C. J. It must be understood that we think this a very important application, and consider the town council right in making it; but, as to the decision, we must pause.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (June 6th,) delivered the judgment of the Court. This was a motion for a certiorari to remove an order for payment of costs of some quo warrantos, and of a rule for a criminal information against some person for affronting a magistrate.(a) The rule must be made absolute, these being clearly no public purposes. But an objection was taken in this case that the treasurer had settled and rendered all his accounts before stat. 7 W. 4 & 1 Vict. c. 78, (July, 1837,) which gives power to remove accounts, the certiorari having been taken away by the former statute. But the latter act, reciting that it is expedient to give all persons interested in the borough fund of every borough a direct and easy remedy for any misapplication of such fund, enacts that any order of the council of any borough for the payment of

(a) See p. 282, ante, note (a).

any sum of money from or out of the borough fund of any borough may be removed into the Court of King's Bench by certiorari, not confining it to orders thereafter to be made, nor to such accounts as were unsettled at the time of passing the act.

Rule absolute.

The QUEEN against PARAMORE.—p. 286.

The orders were brought up, and a rule obtained for quashing them for insufficiency; against which, in the following Trinity term, (Wednesday, June 3d, 1840,)

Sir *J. Campbell*, Attorney-General, showed cause, and contended that the application of the borough fund was not illegal, but was ordered in the bona fide exercise of the discretion of the council, and that no corrupt motives were alleged; and that the individuals elected were compelled to take office under penalty: and, on this part of the case, he referred to *The Attorney-General v. The Mayor of Norwich*, 2 Myl. & Cr. 406.(a) He relied also on the points previously made in opposition to the rule. [PATTESON, J. This town council is not only composed of different individuals from those composing the former one, but it is also a different body. The corporation is indeed the same; but that consists of the mayor, aldermen, and burgesses. The town council is not the corporation.]

Sir *W. W. Follett*, contra. *The Attorney-General v. The Mayor of Norwich* turned entirely on the pleadings. The Lord Chancellor allowed the demurrer, because, consistently with the language of the pleadings, it was possible that the expenses had been incurred in defending the existence of the corporation. Here, such a state of things cannot exist. The town council has no interest in defending the offices of particular individuals, and consequently has no discretionary power of paying the costs of the defence. The other points were disposed of on granting the rule.

Lord DENMAN, C. J. Without reference to our former judgment, it is clear that these orders are bad. The parties were interested as individuals; they did not embody any interest of the corporation.

LITLEDALE, J., concurred.

PATTESON, J. There may be a hardship on an individual, in subjecting him to legal proceedings for accepting an office which he is fineable for not accepting. But, if we were to admit that the borough funds may be applied to defend his office, the consequence would be that the town council would be bound to defend all parties against whom such proceedings were taken, enemies as well as friends.

WILLIAMS, J. With regard to the rule for a criminal information, how can it be for the interest of the borough that an individual who has committed a delinquency should not be punished?

Rule absolute.

(a) And see *The Attorney-General v. Corporation of Norwich*, 1 Keen, 700.

The QUEEN against WATKINSON.—p. 288.

The election of a chief constable for a wapentake in the West Riding of Yorkshire having been made at a petty sessions of the justices usually acting for the wapentake, without notice to the other justices of the riding: Held, that such election was void, and that a chief constable might be elected at a subsequent quarter sessions.

INFORMATION in the nature of quo warranto, calling upon the defendant to show by what authority he claimed to have, &c., the office of a chief constable of the wapentake of Staincliffe with Ewcross, in the West Riding of Yorkshire. By the pleadings (which made part of the case) the following issues were raised.

First, whether the defendant was duly appointed one of the two chief constables for the said wapentake at a general court of quarter sessions holden at Pontefract, in and for the said riding, on April 2d, 1832. Secondly, whether, at such sessions, he was duly admitted to that office. The third, fourth, and fifth issues were upon the question, whether one Christopher Edmondson was not duly appointed to be such chief constable at a special petty sessions of the justices of the peace acting for the said wapentake, duly called and holden for the election of such chief constable on 29th August, 1831.

On the trial before TINDAL, C. J., at the Yorkshire Summer assizes, 1835, a verdict was found for the Crown upon all the issues, subject to the opinion of this Court upon the following case.

There are two chief constables appointed for the wapentake of Staincliffe with Ewcross; and the office of one of those chief constables became vacant on 5th July, 1831, by the death of William Carr. A meeting of the magistrates usually acting for the wapentake was duly called and holden on 29th August, 1831, for the express purpose of electing a chief constable in the room of Carr. At this meeting, Edmondson was appointed, by the majority of the justices present, to be such chief constable, and was recommended by them to be sworn into that office at the next general quarter sessions for the riding. At those sessions Edmondson duly applied to the Court, and requested to be sworn into the office, pursuant to his appointment; which the Court refused, and adjourned the matter to the Pontefract quarter sessions to be holden on 2d April, 1832. At those sessions the defendant was elected and admitted to the office.

The only question of fact in dispute upon the trial was, whether Edmondson had, at the petty sessions, on 29th August, 1831, been actually elected and appointed a chief constable in the place of Carr, and recommended to be sworn in at the next quarter sessions, or whether he had, on that occasion, been merely recommended to the justices to be assembled at the next sessions, as a fit person to be appointed chief constable by the said sessions. The jury found that Edmondson had, at the special sessions, been elected and appointed to the said office and recommended to be sworn in at the quarter sessions, and not merely recommended to the justices at those sessions to be by them elected.

It was admitted, on behalf of the Crown, that, supposing the justices in petty sessions had not the power to make such an appointment, but that that power resided in the justices in quarter sessions, the defendant had been duly elected, appointed, and admitted at the Pontefract quarter sessions, holden on 2d April, 1832.

The questions for the opinion of this Court were,

Whether the election and appointment of Edmondson at the special

petty sessions, holden on 29th August, 1831, was or was not a valid election and appointment.

Or whether the defendant was duly elected, appointed, and admitted at the said general quarter sessions for the riding, holden at Pontefract, on 2d April, 1832.

The case was argued in last Michaelmas term.(a)

Starkie, for the Crown. The principal question is, whether Edmondson was duly elected chief constable by the justices acting for the wapentake, on 29th August, 1831. It will be argued, on the other side, that the justices on that occasion acted without authority; and that the election should have been at quarter sessions. If the power to elect be vested in the justices, quâ justices, as representing the ancient conservators of the peace, then the court of quarter sessions has nothing to do with the election: the members of that court could act simply as individual justices. The statute of Winchester, 2 stat. 13 Ed. 1, c. 6, mentions the office of constables, two to be chosen in every hundred and franchise, to view armour; the office must therefore have existed before.(b) Justices of peace, as the office now is, were first created by 2 stat. 1 Ed. 3, c. 16, which enacts that in every county good men and lawful shall be assigned to keep the peace.(c) The office is further regulated by stat. 4 Ed. 3, c. 2, and 2 stat. 18 Ed. 3, c. 2. The last enacts "that two or three of the best of reputation in the counties shall be assigned keepers of the peace by the king's commission, and at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment," &c. The duties of justices of the peace are, afterwards, laid down in stat. 34 Ed. 3, c. 1, including the duty "to hear and determine at the king's suit all manner of felonies and trespasses done in the same county." Then stat. 12 R. 2, c. 10, enacts "that in every commission of the justices of peace, there shall be assigned but six justices, with the justices of assizes, and that the said six justices shall keep their sessions in every quarter of the year at the least, and by three days, if need be." That statute gave no fresh jurisdiction, and took none away. By it, the sessions were to be held quarterly at least: but they might still be held oftener. It appears from this that the election of constables, if made by justices in the character of conservators of the peace, could not, up to the time of Richard the Second, be in the Court of Quarter Sessions; nor does any provision restrict the election to that Court. Sessions may be holden upon summons, under a precept of two justices; and that seems to be the most regular course, though a sessions may be held without summons; Lambard, *Eirenarcha*, book 4, ch. 2, (p. 380, ed. 1619;) Com. Dig. *Justices of Peace*, (D 3.) A precept by two justices cannot be superseded by other justices of peace; Com. Dig. *Justices of Peace*, (D 3,) citing Lambard, *Eirenarcha*, book 4, ch. 2, p. 383. In *Rex v. Hewson*, 12 Mod. 180, HOLT, C. J., said, "How can justices of peace make a constable, who is an officer at common law, and they only by statute, only there may have been such an usage from the neglect of those to whom it properly belonged; per-

(a) On the 10th and 14th of November, 1838, before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) See *Regina v. Wyatt*, 1 Salk. 175, 381.

(c) See 2 Inst. 558.

haps there may be some old statute for it, which is lost. Ancient usage for three or four hundred years is good evidence of a law. If an act of parliament be lost or embezzled, the law remains still. May be the conservators of the peace did it at common law." [COLERIDGE, J. By 2 stat. 13 Ed. 1, c. 6, two constables are to be chosen in every hundred and franchise to make the view of armour; and they are to present defaults "before justices assigned." What justices were these?] Probably justices in eyre: the high constables could not then be bound to attend at quarter sessions.

It may, however, be argued that the appointment has now devolved upon the magistrates, because the sheriffs' torns and courts leet have ceased to exercise the power. The history of the appointment has been the subject of controversy; but it seems clear that the petty constables were anciently appointed by the freeholders, (at the leet where there was one,) and the high constables at the sheriff's torn held in the hundred: 4 Inst. 265, 267. It appears, indeed, to have been the opinion of Lord COKE, in 4 Inst. 267, and, at one time at least, of Lord HALE, 2 P. C. 96, ed. 1800, (citing *Sharrock v. Hunnemer*, Cro. Eliz. 375,) that the office of high constable was created by 2 stat. 13 Ed. 1, c. 6: other authorities, however, show that it was a common law office: Fitzherbert and Crompton's Office, &c., of Justices of Peace, &c., 222 b., (ed. 1606,) POWELL, J., and HOLT, C. J., in *Regina v. Wyatt*, 2 Ld. Raym. 1189, S. C. 1 Salk. 175, 380, Lord HALE in *Rex v. King*, 3 Keb. 197, 230, (a) (citing *Samoy's Case*), HOLT, C. J., in *Regina v. Jennings*, 11 Mod. 215, Com. Dig. *Leet*, (M 5.) In Ritson's Office of Constable, p. 13, (2d ed.,) it is said, "Nothing can be more certain than that the constable of the hundred, or high constable, whether he be allowed an officer at the common law or not, was instituted long before that statute," (Winchester;) and he gives, from the *Adversaria* of Wats's edition of Matthew Paris, (b) a writ or mandat of the time of 36 H. 3, which seems to have been the foundation of the sixth chapter of the statute of Winchester: "in singulis verò hundredis constituatur unus capitalis constabularius, ad cujus mandatum omnes jurati ad arma de hundredis suis convenient," &c. The courts leet create petty constables still; but in their default, and only then, any two justices of peace were to act, by stat. 13 & 14 C. 2, c. 12, s. 15: *The Case of the Constables of Limington*, 2 Stra. 798, *Case of the Constable of Stepney*, 1 Bulst. 174, *Case of the Village of Chorley*, 1 Salk. 175. And in *Rex v. Hewson*, HOLT, C. J., says, "If there be no leet at all, then you must go to the sheriff's tourn." Now, if the office of high constable existed before 2 stat. 13 Ed. 1, c. 6, and that statute merely enlarged the powers, creating also, perhaps, two high constables in lieu of one, the justices of peace may have succeeded to the power of appointing in lieu of the sheriff's torn holden in the hundred, their commission charging them to "cause to be kept all ordinances and statutes for the good of the peace, and for preservation of the same." But then the justices who elect the officer for the hundred in lieu of the sheriff's torn in the hundred should clearly be the justices of the hundred. This seems to have been understood by the legislature in the time of Henry VIII., since the act for regulating Wales, stat. 34 & 35 H. 8, c. 26, s. 70, enacts "that the said justices of the peace, or two of them at the least, whereof one of them to be of the *quorum*, shall

(a) S. C. as *Keene's Case*, Freem. K. B. and C. P. 848.

(b) See the whole writ at the end of the *Adversaria*.

appoint and name, in every hundred within the limits of thier commission, two substantial gentlemen or yeomen to be the chief constables of the hundred wherein they inhabit; which two constables of every hundred shall have a special regard to the conservation of the king's peace, and shall and may do and use their offices in all and singular things, *as is used by the high constables of the hundreds in England*, and shall be bound to all things as the high constables of the hundreds in England be bound to do." The high constables are the officers of the justices of the hundred, who issue their precepts to them: the duties of the high constable are not confined to the business of the Court of Quarter Sessions. It is a common law principle, that functionaries should appoint their own ministers. Again, if the office was created by 2 stat. 13 Ed. 1, c. 6, it then appears to be an office for the hundred; and the same reasoning applies. In Dalton's Country Justice, c. 185, p. 511, (ed. 1715,) it is said, "The sessions of the peace are a court of record holden before two or more justices of the peace, whereof one is of the *quorum*, for execution of the authority given them by commission of the peace, and certain statutes and acts of Parliament." The quarter sessions are simply the general sessions holden quarterly. There is nothing in the nature of this court to give it a peculiar power of appointing the high constable.

Wortley, contra.—The question is, not whether justices in petty sessions might appoint, with the approbation of the general sessions, but whether their appointment against the will of the general sessions be good. If it be, a mandamus would lie to the general sessions to swear in a constable appointed at the petty sessions. The authority of the justices must arise either from statute, or from the devolution of a duty upon them, on the torn ceasing to act. It seems that, from a time earlier than the Conquest, the torn holden in the hundred was for the whole county, though holden in the several hundreds for the sake of convenience. (a) In this point, it was distinguished from the hundred court, and was analogous to the general or quarter sessions. In Dalton's Justice, c. 28, p. 57, (ed. 1715,) there is a reference to a dictum of FINIUX, C. J. of K. B., in Yearb. Pasch. 12 H. 7, pl. 1, fol. 17 B., 18 A., the effect of which is, that the counties were divided into hundreds, and high constables appointed for each hundred, because the counties were too populous to be undertaken by the sheriff, who originally had the government of them. This would explain why the sheriff's torn, though holden in the hundred, is still merely the sheriff's court for the whole county. So the leet was derived from the torn; and the petty constables, being the officers for the smaller divisions, were there elected. The authorities are collected in 3 Hawk. P. C., p. 123, (7th ed.) book 2, c. 10; in 2 Inst. 71; and in 4 Inst. 259, 267. Now it is clear that the torn, as a criminal Court for the county, is at present represented, not by individual justices, but by the general sessions; and these cannot be distinguished from the quarter sessions; Lambard's Eirenarcha, book 4, c. 19, 20, pp. 592, 593, (ed. 1619.) By stat. 12 R. 2, c. 10, the number of justices of the peace for a county is limited to six; by stat. 14 R. 2, c. 11, it is enlarged to eight. But there are eight wapentakes in the West Riding of Yorkshire; if, therefore, the election of high constable for the wapentake were confined to the justices of a single wapentake, the high constable in the West Riding would, even after stat. 14

(a) See Lord Coke on Magna Charta, stat. 9 H. 3, c. 35, 2 Inst. 70.

R. 2, c. 11, have been appointed by a single justice. But, in fact, petty sessions are of modern origin, and appear not to be recognised by the law, except where modern statutes give a power to two or more justices. Then, to execute such powers, the requisite number of justices meet periodically. The Court is therefore created only by these statutes; and the title has no other legal meaning. The holding of general sessions quarterly is prescribed by stat. 12 R. 2, c. 10, and 1 stat. 2 H. 5, c. 4, s. 2. Lambard, *Eirenarcha*, book 4, c. 20, p. 623, says that the special sessions differ from the general chiefly in this, "that they be holden at other times, when it shall please the justices themselves, or any two of them (the one being of the quorum) to appoint them. And this power they have, not only by the commission, but also by the statute 2 H. 5, c. 4," (1st statute) "which alloweth them to do it more often than the four times, if need do so require. They be also (for the most part) summoned to some special business, and not directed to the general service of the commission: And yet there is no doubt, but that all the articles within the commission of the peace, are both inquirable and determinable at any special sessions of the peace." And in book 4, c. 1, (p. 378,) he defines a session of the peace to be "an assembly of any two (or more) justices of the peace (one of them being of the quorum) at a certain day," &c., "appointed to inquire," &c. "and thereupon to proceed to hear and determine," &c.; and excludes such assemblies as are only for inquiry, which may be holden by justices, no one of whom is of the quorum. This shows that by "the sessions" the books mean a session of the whole body of justices; which is inconsistent with the notion that a limited number of justices, acting for a particular district, can, in the execution of their general authority, exclude the rest. What is now called a special petty sessions, might be held by justices who are not of the quorum, for certain purposes. That, therefore, is not, in the proper sense of the word, a session of the peace. [COLERIDGE, J. When sessions meet for a special purpose, such as agreeing upon measures respecting the gaol, or the finances of the county, is not that by adjournment from a general sessions?] That is not always so. For instance, all the justices of the three Ridings of Yorkshire meet at York once in every year: that could not be by adjournment from any other sessions. The session which has the limited power is holden, according to Lambard's view, in the passage last referred to, under the first assignavimus, not the second, which requires one of the quorum. The legislature have adopted the principle of giving certain powers to two or more justices, relying on the advantage to be derived from their consulting each other; but such petty sessions can execute only such powers as the legislature expressly gives, or such as may be exercised by a single justice. It is true that Lambard, *Eirenarcha*, book 2, c. 6, p. 186, says that, under the first assignavimus, one justice of peace may see that two constables be chosen in each hundred and franchise. He also says, *Duties of Constables*, &c., p. 5, (ed. 1619,) that the constables of hundreds were first created by the statute of Winchester, 2 stat. 13 Ed. 1, c. 6. Neither of these positions can be supported, as appears, indeed, with respect to the latter, by the argument on the other side. It seems that the only way in which he supposed that a single justice can see to the appointment of a high constable was by presenting the sheriff if he does not hold the torn for

the purpose, or the lord for not holding the leet; Eirenarcha, book 1, ch. 9, p. 46, Dalton's Justice, c. 5, p. 20.

There is, further, no ancient recognition of a justice as acting for a single hundred or division. Stat. 33 H. 8, c. 10, s. 1, directs that, at the general sessions next after Easter, the justices shall divide themselves, assigning two at least, into hundreds, wapentakes, &c., and the justices so divided shall hold a sessions six weeks at least before every quarter session. That statute is, however, repealed by stat. 37 H. 8, c. 7, which enacts that all the articles contained in the repealed statute shall be inquired of before all justices of peace at their ancient quarter sessions. In Burn's Justice, title *Poor* (vol. 4, p. 16, ed. D'Oy. & W.; vol. 4, p. 25, 28th (Chitty's) ed.), it is said, "In some of the ancient statutes, not now in force, as particularly the 22 H. 8, c. 12, the justices were required to *divide* themselves, for the better execution of the regulations concerning the poor. And thence came the clause in the subsequent statutes, that the justices *of the division* were to do such and such things. But as there is no law at present which requires them to *divide* for the aforesaid purposes, there is properly no *division*, in the sense which the statutes intended. In *Rex v. Price*,^(a) ASTON, J., said that, for the purpose of granting an ale license, "any justice of the county, going to the meeting in the division," was "a justice of the division" within stat. 2 G. 2, c. 28, s. 11. In *Evans v. Stevens*, 4 T. R. 224, 459, it was held that the word "division," in the act for better securing the freedom of elections, stat. 22 G. 3, c. 41, s. 1, meant something analogous to riding or county, and not one of the different parts of a county, &c., which is all comprehended in a single commission; and there Lord KENYON said^(b) that the divisions were "capriciously adopted in particular counties." Any one of such divisions was not necessarily confined to one hundred or wapentake, nor co-extensive with it; nor are divisions made under stat. 9 G. 4, c. 43, for the better regulation of divisions in the several counties of England and Wales," so confined; and therefore the recent statute 10 G. 4, c. 46, s. 1, was found necessary, to provide for the duty formerly executed by the high constable of the hundred, &c., under such circumstances. Stat. 37 G. 3, c. 143, s. 1, enables "the justices of the peace, at their respective petty sessions, within the divisions, districts, and other places of the several counties in England and Wales," to appoint examiners of weights and balances; and in *Rex v. The Justices of Devon*, 1 B. & Ald. 588, it was held that this applied only to divisions existing at the time of the act passing; and Lord ELLENBOROUGH said, "What the legal qualities of a division may be, is perhaps doubtful." It is true that Dalton, Just., c. 28, p. 56, says, "The usual manner is, that these high constables of hundreds be chosen either at the quarter sessions of the peace; or if out of the sessions, then by the greater number of the justices of peace of that division where they dwell: and likewise that they be sworn either at the sessions, or by warrant from the sessions; which course hath also been often allowed and commended to us by the judges of assize." What he means by "division" does not appear; but, as he says that the constables, if chosen out of sessions (meaning general sessions), should be sworn at the sessions, or by warrant from the sessions, it seems that any rate he considered the real power to be in the

(a) Note [a] to *Rex v. Stevens*, Cald. 805.

(b) Page 462.

justices of the county at large, though possibly he considered that the appointment out of sessions was good till the sessions had assented or dissented. A constable chosen at the leet may be sworn before a single justice; *Rex v. Franchard*, 2 Str. 1149: the necessity, therefore, of swearing a high constable, chosen for a hundred at the general sessions, must arise from the power of appointment being really in the general sessions, not from any incapacity in a single justice to receive the oath of office. The swearing, indeed, appears to constitute the appointment. In *Rex v. Whitechurch*, 7 B. & C. 573, (14 E. C. L. R.,) it was objected that a churchwarden signing a parish certificate had not been sworn in; the court, the certificate being nearly seventy years old, said that they would presume that the churchwarden had been sworn in; and LITTLEDALE, J., said, "upon the question whether a churchwarden can lawfully do any act before he is actually sworn into office, I entertain some doubt. That matter was not fully discussed in the case cited from Ventris." (a) In *Rex v. Hearle*, 1 Str. 625, it was found, on the trial of a quo warranto for exercising the office of mayor, that the defendant was duly elected, and that he was not sworn; upon which judgment of ouster was given. And in *Rex v. Franchard* the quo warranto was applied for on the ground that the defendant had not been sworn; and the reason for refusing the application was, not that swearing was unnecessary, but that in fact he had been sworn: and there the office was that of constable.

There are numerous authorities for the position, that the election of head-constable is by the justices at their general sessions: Bacon, Law Tracts, p. 183; (b) Sheppard on the Offices of Constables, &c., ch. 7, s. 2; (c) 1 Bla. Com. 355, citing *Regina v. White*, 1 Salk. 150; *Regina v. Wyat*, 1 Salk. 175, 380; *Charley Parish's Case*, 3 Salk. 98; Com. Dig. *Leet*, (M. 5,) citing *The Case of the Constable of Stepney*, 1 Bulst. 174. There is also a MS. opinion given in 1811 by HOLROYD, J., when at the bar, in which the same view is taken, and the above cases are cited. There is a precedent of an indictment for refusing to execute the office of high constable, in the Crown Circuit Companion, p. 165, (9th ed.), which is also referred to in Wentworth's Pleading, (Index to vol. 6; tit. vi.) there it is alleged that the defendant was elected at the general quarter sessions. The Welsh Judicature Act, 34 & 35 H. 8, c. 26, which has been cited on the other side, and which, says Barrington, (d) "contains a most complete code of regulations for the administration of justice, with such precision and accuracy, that no one clause of it hath ever yet occasioned a doubt, or required an explanation," affords a strong argument for the defendant. Sect. 53 appoints, for every shire, justices of peace and quorum, who, by sect. 55, are not to exceed eight in number, besides the president, council, and four Welsh judges: sect. 57 enacts "that the said justices of peace, or two of them at the least, whereof one to be of the quorum," shall hold sessions four times a year, and at other times upon urgent causes, "as justices of peace in England use to do; and shall have like power and authority in all things," "and shall be bound to use and do their offices, in like manner as is used in Eng-

(a) *Anonymous case*, 1 Ventr. 267; cited in 4 Vin. Abr. 526, *Churchwardens*, (A. 2), pl. 9.

(b) Tit. *Office of Constables*, ed. 1737.

(c) 4th ed. See also *Shepherd's Sure Guide*, &c., ch. 1, s. 8, and ch. 20, pp. 18, 296, (2d ed.).

(d) *Observations on the Statutes*, 456, 3d edit.

land:" then sect. 70 gives the appointment of high constables to "the said justices of the peace, or two of them at the least, whereof one of them to be of the *quorum*." This, by reference to sect. 57, clearly refers to the general sessions. Stat. 13 & 14 C. 2, c. 12, s. 15, may be said to relate only to petty constables: but, supposing that to be so, the inference is that, a fortiori, the legislature considered the power to be in the general sessions in the case of high constables, who are officers of greater importance. Stat. 10 G. 4, c. xcvii., (local and personal, public,) s. 1, gives the justices of Cheshire, at quarter sessions, the power of appointing special high constables for hundreds.

The high constables are the servants, not of the justices of the hundred only, but of all the justices; who, at the general sessions, must be attended by all the high constables.(a) It would be highly inconvenient if a small number of the justices could make the appointment of such an officer against the will of the whole body.

Further, it appears by the case that the defendant is duly elected unless Edmondson was previously elected; and that Edmondson has not been sworn in. Now, unless the office was full de jure and de facto, the election of the defendant was good. But the office cannot have become full de facto by Edmondson appearing and demanding to be sworn; *Rex v. Ponsonby*, Sayer's Rep. 245, cited Bul. N. P. 211. In assize for the office of serjeant at mace to the House of Commons, it was held no proof of seisin that the party went to the House of Commons and demanded his place, but received no fees; *Cragg v. Norfolk*, 2 Lev. 108, cited in Com. Dig. *Seisin*, (D). So there must be an user, as well as a claim, of office, to support a quo warranto; *Rex v. Whitwell*, 5 T. R. 85.(b) In *Tufton v. Nevinsion*, 2 Ld. Raym. 1354, a mandamus to swear in a party was granted, and issue was joined on the allegation that he had been elected. This shows that Edmondson's proper course would have been to apply for a mandamus directing the quarter sessions to swear him in: if his appointment at petty sessions gave him a right to the office, the Court would have granted the writ; *Rex v. Ellis*.(c)

Starkie, in reply. The last point is not raised by the case or the pleadings:(d) nothing appears but that Edmondson, having an inchoate right by the election of the justices, demanded to be sworn in, and the sessions adjourned without either rejecting or granting his demand. In that state of things no election of another could be good.

The argument as to convenience is in favour of the Crown. If the justices may appoint in petty sessions delay will be saved. And the exercise of the office takes place within the hundred only. It is true that the appointment was formerly made at the torn; but then the torn was held, for convenience, in every hundred: Horne's Mirror of Justices, p. 108, ch. 1, s. 16. So, also, it would appear to be the most convenient arrangement that the justices should, in each hundred, make the appointment. The least convenient would be that there should be a canvass extending over the whole county.

As to the legal question. The relator contends, not that the justices could not elect at quarter sessions, but that the commission warrants the election by justices in the hundred, though not assembled in quarter ses-

(a) See Dalton's Just. c. 185, p. 513.

(b) See *Regina v. Pepper*, 7 A. & E. 745, (34 E. C. L. R.)

(c) Note (a) to *Rex v. Courtenay*, 9 East, 252. S. C. 2 Str. 994.

(d) It is not thought necessary to refer to the pleadings more particularly.

sions. The change, after the discontinuance of the sheriff's torn, appears to have consisted in a transfer of the power of appointment, not merely to the hundred, but to the justices of the peace; and, in some cases, the leets retain the right, in which they might be supposed to have a vested interest; 3 Hawk. P. C. 135, book 2, c. 10, s. 37, 7th ed. According to Lambard, Eirenarcha, book 1, ch. 4, p. 20, it was by 2 stat. 1 Ed. 3, c. 16, that the election of conservators or wardens of the peace was transferred from the people to the King. The commission follows, in some respects, the statute of Winchester, 2 stat. 13 Ed. 1, c. 6. Whatever may be done by the first assignavimus, that is, by justices not of the quorum, may be done at special sessions. The first assignavimus gives powers analogous in many respects to those of the ancient conservators of the peace: the second relates principally to judicial duties. It is clear that the justices do not appoint high constables under the second assignavimus. And it appears from Lambard, Eirenarcha, book 2, ch. 6, p. 186, that they do so under the first. It is said that the power with respect to constables is to be exercised by presentment at general sessions; but for this no reason can be given. [COLERIDGE, J. Where is the high constable to be sworn? There may be no justice at the leet.] The course here pursued is that recommended in Dalton's Just., ch. 28, p. 56. The high constable, after his election, demanded to be sworn at the quarter sessions; but the swearing was not necessary to his being high constable de facto; *Rex v. Corfe Mullen*, 1 B. & Ad. 211, (20 E. C. L. R.) The election may, it is true, be made by as many justices of the county as choose to meet; but it will not follow from this that the act must be done at quarter sessions. Any two justices may make a sessions; Dalton's Just. ch. 185, p. 511. All sessions not holden exclusively for a particular purpose may be called general sessions; 3 Hawk. P. C. 91, book 2, ch. 8, s. 18; and Lambard, who appears to class under the head of special sessions all sessions holden at other than the ordinary times, still says, Eirenarcha, c. 20, p. 623, that at such special sessions all articles within the commission may be inquired of and determined. In Dalton's Just. ch. 28, p. 56, it is said "Every justice of peace may cause two constables to be chosen in each hundred," for which Lambard, 190,(a) is cited; and he adds, "and this seemeth to be meant of the high constables of hundreds, and to include and imply, of congruence, the swearing of them; and seemeth to be by virtue and force of the statute of Winchester, made 13 Ed. 1, and of the commission, the first assignavimus or clause." The justices in the hundred act as justices of the whole county, just as a freeholder is a freeholder of the whole county, but exercises his rights in a particular place. Therefore, the authorities cited to show that the justices of divisions have, as such, no specific power, do not affect the relator's case. And this meets the difficulty suggested from the possibility of there not being enough justices in the particular division. Stat. 9 G. 4, c. 43, has no bearing on this question; the enactments regard merely arrangements to be made as to the divisions in which special sessions are to be held. The argument urged for the relator from stat. 34 & 35 H. 8, c. 26, has not been answered. Stat. 13 & 14 C. 2, c. 12, s. 15, shows that the general sessions were not called on to act, in the case of petty constables, except on disapproval of those appointed by the two justices. The authority of

(a) Eirenarcha, book 2, ch. 6, p. 186, ed. 1619.

Lord BACON, Office of Constables,^(a) has been referred to. But, on the question as to the practice of justices of peace, his authority is of less weight than that of Lambard or Dalton; and his remarks, in ch. 19, on the origin of the office of high constable, show that he was imperfectly informed: he does not mention 2 stat. 13 Ed. 1, c. 6, at all. The language of Blackstone, 1 Com. 355, is not borne out by the authority which he cites. The other authorities contain no more than dicta not essential to the decision of the cases in which they occurred. The precedent of an indictment, in which the constable is alleged to have been elected at the quarter sessions, does not show that he could not be elected elsewhere; it might as well be argued that a high constable could be elected only at a court leet; for there are many precedents alleging such an election. In *Rex v. Hearle*, 1 Str. 625, there was a specific issue on the swearing; and that was for the office of mayor, from which no argument can be drawn as to that of constable. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (May 24th,) delivered the judgment of the Court.

The defendant, having been in due form of law elected, admitted, and sworn at the General Quarter Sessions into the office of one of the chief constables of the wapentake of Staincliffe, in the West Riding, the question is, whether, at the time of his election, the office was not already full, a person of the name of Edmondson having been previously elected and appointed into the office, on the same vacancy, at a petty sessions of the justices of the peace usually acting for the same wapentake, holden for that declared purpose.

The right of appointing is admitted, on all hands, to be in the general body of the justices of the peace, since the non-user of the sheriff's torn. But it was argued for the crown that the right may be exercised even by any single justice of the peace, and at all events by the regular meeting held at a petty sessions by those who usually act in that portion of the Riding.

The argument for the defendant was not directed against this doctrine, when applied to the right of dealing with offenders, and acting in the ordinary exercise of the jurisdiction of a justice of the peace; but a difference was taken between such proceedings and matters of election and appointment, which, being vested in the whole body, necessarily and of their own nature import that the whole body must have the opportunity of voting in the election of their officer; that they must therefore be convened for that purpose.

Manifestly this cannot be done by the justices of the peace of a single wapentake agreeing among themselves to meet and make the election. No particular method of summoning is prescribed by law; but any method which secures full notice, and allows all to exercise their judgment, will suffice. Now this may well be done, and we are of opinion that it has been done in favour of this defendant, at the general sessions, and that it was not well done at the petty sessions for the wapentake.

It follows that the election of the defendant was good; and that he is entitled to our judgment. Judgment for the defendant.

(a) Law Tracts, p. 183, ed. 1787.

HAIGH and another against BROOKS.—p. 309.

Declaration in assumpsit, stating that defendant promised, in consideration that plaintiffs, at his request, would give up to him a certain guarantee of 10,000*l.* on behalf of L., then *held by plaintiffs*. Averment, that plaintiffs gave up the guarantee, but defendant did not perform his promise. Plea, that guarantee was a promise to answer for the debt of another, and that there was no agreement, &c., in writing, wherein any sufficient consideration was stated, (according to stat. 29 Car. 2, c. 3, s. 4.) And that the supposed guarantee was contained in the following written memorandum signed by defendant:—"Messrs. H.," the plaintiffs.) "In consideration of your being in advance to L. in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. J. B."

Held, by the Court of Queen's Bench, on demurrer, that the words of the guarantee did not necessarily imply a past advance; and that, if they left it even doubtful, whether a future advance was not guaranteed, a promise made in consideration of giving it up was valid.

But,

Held, further, that at all events it appeared on the pleadings that the plaintiffs had delivered something to the defendant, on the faith of his promise, which he at the time considered valuable, and this being so, and no fraud imputed, he could not afterwards excuse a breach of the promise, by alleging that the thing given up was not of the value he had supposed.

Judgment affirmed on error, by the Court of Exchequer Chamber.

Held, by the Court of Error, that the guarantee did not necessarily imply a past advance; and that the plaintiffs, on a trial, might have offered evidence to show that future advances had been contemplated.

Held also, Maule, B., dubitante, that the paper on which the guarantee was written appeared by the declaration and plea to have been given up by plaintiffs to defendant; and that this alone was consideration for a promise.

Held, by the Court of Queen's Bench, that, on the trial of an issue of fact raising the question whether or not the above guarantee had been delivered up, the guarantee might be given in evidence, though unstamped.

ASSUMPSIT. The first count of the declaration stated that heretofore, to wit on, &c., "in consideration that the said plaintiffs, at the special instance and request of the said defendant, would give up to him a certain guarantee of 10,000*l.*, on behalf of Messrs. John Lees and Son, Manchester, then held by the said plaintiffs, he the said defendant undertook, and then faithfully promised the said plaintiffs, to see certain bills, accepted by the said Messrs. John Lees and Sons, paid at maturity; that is to say, a certain bill of exchange," bearing date, &c., drawn by plaintiffs upon and accepted by the said Lees and Sons, payable three months after date, for 3466*l.* 13*s.* 7*d.*, and made payable at, &c.: and also a certain other bill, &c.: describing two other bills for 3000*l.* and 3200*l.* drawn by plaintiffs upon and accepted by Lees and Sons, and made payable at, &c.: Averment, that plaintiffs, relying on defendant's said promise, did then, to wit on, &c., "give up to the said defendant the said guarantee of 10,000*l.*" Breach, non-payment of the bills, when they afterwards came to maturity, by Lees and Sons, or the parties at whose houses the bills respectively were made payable, or by defendant, or any other person, &c.

Third plea, to the first count: "That the said supposed guarantee of 10,000*l.*, in consideration of the giving up whereof the defendant made such supposed promise and undertaking as therein mentioned, and which guarantee was so given up to the said defendant as therein mentioned, was a special promise to answer the said plaintiffs for the debt and default of other persons, to wit, the said Messrs. John Lees and Sons in the said first count mentioned; and that no agreement in

respect of, or relating to, the said supposed guarantee or special promise, or any memorandum or note thereof, wherein any sufficient consideration for the said guarantee or special promise was stated or shown, was in writing and signed by the said defendant, or any other person by him thereunto lawfully authorized. And the said defendant further saith that the said supposed guarantee, in consideration of the giving up whereof the defendant made the said supposed promise and undertaking in the said first count mentioned, and which was so given up as therein mentioned, was and is contained in a certain memorandum in writing signed by the defendant, and which was and is in the words and figures and to the effect following, that is to say:—*‘Manchester 4th February, 1837. Messrs. Haigh and Franceys. Gent., In consideration of your being in advance to Messrs. John Lees and Sons, in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount, (say 10,000*l.*.) on their behalf. John Brooks.’*—And that there was no other agreement or memorandum or note thereof, in respect of, or relating to, the said last-mentioned supposed guarantee or special promise: wherefore the said defendant says that the supposed guarantee, in consideration whereof the said defendant made the said supposed promise and undertaking in the said first count mentioned, was and is void and of no effect; and therefore that the said supposed promise and undertaking in the said first count mentioned was and is void and of no effect.” Verification.

Demurrer, assigning for cause, “that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guarantee in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was, therefore, executed by the said defendant, and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned.” Joinder.

The demurrer was argued in last Hilary term. (a)

Sir *W. W. Follett*, for the plaintiff. The undertaking declared upon is, on the face of it, sufficient to satisfy the Statute of Frauds, 29 Car. 2, c. 3, s. 4. It is said, however, that the consideration is really insufficient, because the guarantee delivered up, was one which could not have been sued upon, consistently with the statute. But, assuming that to be so, a promise in consideration of delivering up such a guarantee might still be good. The defendant might, for substantial reasons, wish to have the guarantee back. His mercantile character was pledged by it. It might, on various other accounts, be important to him that such a paper should not remain in the plaintiff’s hands; and, if the bargain was made upon any consideration, the Court will not inquire into its adequacy. This principle was lately recognised in *Hitchcock v. Coker*, 6 A. & E. 438, (33 E. C. L. R. 98.) (b) Such a promise might be made in consideration of delivering up a letter; no one but the defendant might be able to judge how far the possession of it was valuable; but, if the letter was given up at his request, the rule would apply, that any thing so given, to the plaintiff’s detriment, or the benefit of the defendant, is consideration for an assumpsit. Suppose the undertaking given up had been one rendered unavailing by the Statute of Limitations, ne

(a) January 18th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, J.

(b) And see *Archer v. Marsh*, 6 A. & E. 959, (33 E. C. L. R. 254.)

action would have lain upon it, but the attempt to enforce it could not, perhaps, have been resisted without injury to the defendant's mercantile character; the relinquishment of it, therefore, would have been good consideration for a promise. The present is a similar case. Release from a moral obligation is consideration enough for an express promise. If it were necessary that something should be foregone to which there was a legal right, the delivery of the mere written paper, which contained the first guarantee, was sufficient in this case. The plaintiffs are entitled to put some value on the possession of such a paper, though not legally available; as they might, on the possession of a cancelled bond, or bills accepted by the defendant on wrong stamps. It is not, indeed, clear in this case that the first guarantee was void. In *Boehm v. Campbell*, 3 B. Moore, 15, (4 E. C. L. R. 245;) S. C. 8 Taunt. 679, (4 E. C. L. R. 245,) a similar guarantee was held to show a sufficient consideration, though the advance for which the security was given, had been already made, and it did not appear more distinctly than in the present case, that time was to be granted. Supposing it even questionable, whether the former undertaking bound the defendant, yet the discharge from a claim, or waiver of a defence, on which the promisee might or might not have been legally entitled to succeed, is consideration enough to support an assumpsit; *Longridge v. Dorville*, 5 B. & Ald. 117, (7 E. C. L. R. 43;) *Stracy v. The Bank of England*, 6 Bing. 754, (19 E. C. L. R. 224.) Here, however, it appears, at all events, that the original guarantee may have been given under circumstances which rendered it morally binding; and that brings it within the principle of *Lee v. Muggeridge*, 5 Taunt. 36, (1 E. C. L. R. 10,) and other cases in which promises supported by moral obligation, have been held sufficient.

Sir *J. Campbell*, Attorney General, contra. First, the original guarantee was void; and, if so, then, secondly, the promise declared upon is without consideration. First, the guarantee of February 4, 1837, expresses only the past consideration of the plaintiffs "being in advance." The cases cited in note (1) to *Osborne v. Rogers*, 1 Wms. Saund. 264, show that this is not sufficient ground for an assumpsit, no request being alleged. A valid consideration was essential to a promise at common law; and, when the Statute of Frauds required that the agreement, in certain cases, should be written, it thereby became necessary, not only that a proper consideration should exist, but that the writing should distinctly show it: *Wain v. Warlters*, 5 East, 10; *Saunders v. Wakefield*, 4 B. & Ald. 595, (6 E. C. L. R. 531;) *Jenkins v. Reynolds*, 3 Brod. & B. 14, (7 E. C. L. R. 328;) *Cole v. Dyer*, 1 Cro. & J. 461; S. C. 1 Tyrwh. 304; *Wood v. Benson*, 2 Cro. & J. 94; S. C. 2 Tyrwh. 93; *James v. Williams*, 5 B. & Ad. 1109, (27 E. C. L. R. 280.) A consideration cannot be intended; it must be actually expressed, or necessarily to be implied; *Hawes v. Armstrong*, 1 New Ca. 761, (27 E. C. L. R. 565;) *Ruikes v. Todd*, 8 A. & E. 846, (35 E. C. L. R. 546.) Secondly, the guarantee being void, the undertaking substituted for it, without any new consideration, is void also. The case is no better than if a second guarantee had been given in the words of the first. A consideration, to support a promise, must have some value in point of law; *Smith and Smith's Case*, 3 Leon. 88, and other authorities cited in note (b) to *Barber v. Fox*, 2 Wms. Saund. 137 e, 5th ed. (a) *Rann*

(a) See *Jones v. Waite*, 5 New Ca. 341, (35 E. C. L. R. 130.)

v. Hughes, note (a) to *Mitchinson v. Hewson*, 7 T. R. 350, illustrates the same point. A man may have in his possession a letter, of which improper use might be made; but his delivering it up is no legal consideration. An unfounded action may create annoyance; but the renouncing it is no consideration in law for a promise. Where, indeed, there is a reasonable doubt, in point of law, whether the promisee would or would not succeed if the litigation were prosecuted, the case is different; that was so in *Longridge v. Dorville*, 5 B. & Ald. 117, (7 E. C. L. R. 43,) and *Stracy v. The Bank of England*, 6 Bing. 754, (19 E. C. L. R. 224.) In *Shortrede v. Cheek*, 1 A. & E. 57, (28 E. C. L. R. 37,) (a) the consideration disclosed was, that the plaintiff should withdraw a promissory note, on which he had an unquestioned right of action: and PARKE, J., said, "There is no doubt that the giving up of any note upon which the plaintiff might have sued, would be a sufficient consideration." It is argued, that foregoing a security upon which the Statute of Limitations had attached, would be a consideration; but there an action would lie on the security, if the statute were not pleaded. Whether the giving up a bill drawn on a wrong stamp, would be a consideration or not, may be questionable; but the objection is not one of which the Court would take judicial notice: here the Court must take notice that the guarantee is invalid. It is contended here that the promise is binding, because grounded on a moral obligation; but that obligation rests on a promise which is itself not binding: the new engagement, then, cannot have more force than the original one. In the cases where a moral obligation has been held sufficient ground for an express promise, the obligation has been something more than a nudum pactum: thus, in *Lee v. Muggeridge*, 5 Taunt. 36, (1 E. C. L. R. 10,) money had been advanced by the plaintiff at the request of the promisor. But the doctrine, that a moral obligation is sufficient consideration for a subsequent promise, is not free from doubt. Lord TENTERDEN said, in *Littlefield v. Shee*, 2 B. & Ad. 811, (22 E. C. L. R. 187,) that it must be "received with some limitation." The instances which have been considered as establishing that doctrine, are brought together in note (a) to *Wennall v. Adney*, 3 Bos. & Pul. 249, and seem to resolve themselves into these classes. First, where there has been a legal obligation antecedent to the promise; as the duty of overseers to provide for the poor. Secondly, where there was an antecedent equitable liability, as that of an executor to pay legacies; but the doctrine, as applicable to these cases, appears to have been overruled. Thirdly, where a debt existed before the promise, but the remedy was barred by statute: as in the cases of certificated bankrupts or discharged insolvents, or where the Statute of Limitations has attached: in these instances, the party indebted may waive the statutory bar, and oblige himself, by a promise, to pay the debt. Fourthly, where a promise merely voidable, has been ratified; as in the case of a person of full age promising to pay a debt contracted during his infancy. (b) In all these cases, so far as the doctrine is established, there has been an actual benefit received, or a debt, or other ground of legal obligation, antecedent to the promise relied upon: not merely a nudum pactum, as in the present instance, where the party originally promising had received no benefit, nor had the plaintiffs incurred any loss or prejudice at his request.

(a) See *Wilkinson v. Byers*, 1 A. & E. 106, (28 E. C. L. R. 48.)

(b) See *Meyer v. Haworth*, 8 A. & E. 467, (35 E. C. L. R. 546.)

The money had been advanced when the guarantee was given; then the defendant says, "Forego the guarantee, and I will see you paid." The prior moral obligation was only that which every man is under to keep his word. *Nash v. Brown*, Chitty on Bills, 74, note x, 9th edit., (1840,) by Chitty and Hulme; *Holliday v. Atkinson*, 5 B. & C. 501, (11 E. C. L. R. 286,) and *Bret v. J. S and his Wife*, Cro. El. 755, (cited in note [b] to *Barber v. Fox*, 2 Wms. Saund. 137 e, 5th ed.,) all show that moral considerations, where no actual benefit has been received by one party, or prejudice sustained by the other, and no legal duty has attached, are not sufficient ground for an assumpsit. As to the delivery, in this case, of the mere paper, it is not pretended that the paper had any value: the contract of guarantee, not the paper containing it, was the object really in question.

Sir *W. W. Follett*, in reply. It may be collected from the guarantee in this case, as it was from that in *Boehm v. Campbell*, 3 B. Moore, 15, (4 E. C. L. R. 245;) S. C. 8 Taunt. 679, (4 E. C. L. R. 245,) that the consideration for giving it was forbearance; and, if that appears with certainty, though not expressed in direct terms, the guarantee was sufficient. *Boehm v. Campbell* is not overruled by *Raikes v. Todd*, 8 A. & E. 846, (35 E. C. L. R. 546.) This Court, in the latter case, could not see clearly that the consideration stated in the guarantee was that alleged in the declaration: but two of the learned judges were inclined to think, with ALDERSON, B., who tried the cause, that "I hereby undertake to secure to you the payment of any sums of money you have advanced" to H. D., implied a future forbearance by the plaintiffs. So far, that case is favourable to the present plaintiffs: and the words relied upon by them, "I do hereby give you my guarantee for that amount," are stronger than those used in *Raikes v. Todd*. And, if it was only doubtful whether such a guarantee was not available, the giving it up was a good consideration. If the invalidity of it was not a point as clear as that the eldest son inherits, the Court will not measure the degree of doubt. It has scarcely been disputed that the giving up of bills drawn on wrong stamps, or a contract on which the Statute of Limitations had attached, would be sufficient consideration: but those cases do not essentially differ from the present. The bills are void from the first, and cannot be made valid; though the promissor may have good reason for wishing to get them into his possession. It is suggested that the bar created by the Statute of Limitations may be waived; but so also may that under the Statute of Frauds. It is clear that, to support a promise of this kind, there need not have been an original liability in the promissor; for that is not so in the case of the bills, or in that of the contract made during infancy. That a promise may be founded on sufficient consideration, though no benefit has accrued to the promissor, appears from *Stevens v. Lynch*, 12 East, 38, where the drawer of a bill, knowing that time had been given to the acceptor, undertook to pay on the acceptor's default, and an action was held maintainable on that undertaking. But, supposing the guarantee in this case to have been totally void, the giving up of a paper on which no action would lie may be sufficient consideration for a promise. Here the plaintiffs, though not entitled to recover on the guarantee, might have brought trover for the document, if unlawfully taken out of their hands. In considering whether or not such an action would lie, the value would be of no importance; it is enough for the

present argument, if the plaintiffs could have recovered a shilling. Suppose the defendant had said, "If you will not bring trover, I will pay the bills;" an action would clearly have lain on such an agreement, and the case would not have differed from the present. The consideration here is, not the releasing of an action on the guarantee, but the giving it up: whatever its value may have been, the bargain is binding. [COLERIDGE, J. It is decided in *Scott v. Jones*, 4 Taunt. 865, that trover lies for an unstamped document *if* it is capable of being made good by stamping.] Any paper may be the subject of an action of trover.

Cur. adv. vult.

LORD DENMAN, C. J., in this term, (June 6th,) delivered the judgment of the Court.

This action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giving up a guarantee of 10,000*l.*, due from the acceptor to the plaintiffs. Plea, that the guarantee was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guarantee were binding in law or not. The form of the guarantee was set out in the plea. "In *consideration of your being in advance* to Messrs. John Lees and Sons, in the sum of 10,000*l.*, for the purchase of cotton, I do hereby give you my guarantee for that amount, (say 10,000*l.*), on their behalf. *John Brooks.*"

It was argued for the defendant, that this guarantee is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees' acceptances. In the first place this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guarantee, is an assertion open to argument. It may, possibly, have been intended as prospective. If the phrase had been "in consideration of your *becoming* in advance," or, "*on condition of your being in advance,*" such would have been the clear import. (a) As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact, could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guarantee could have been available within the doctrine of *Wain v. Walters*, 5 East, 10, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how

(a) See the discussion on the words, "for giving his vote," in *Lord Huntingtower v. Gardner*, 1 B. & C. 297, (8 E. C. L. R. 83.)

can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge. We, therefore, think the plea bad: and the demurrer must prevail.

Judgment for the plaintiffs.

There was also, in this case, an issue of fact, raising the question whether or not the plaintiffs had given up the original guarantee. On his issue the parties went to trial at the Liverpool Spring assizes, 1839, before ALDERSON, B. The plaintiffs called on the defendant to produce the guarantee. On production it appeared to be unstamped, and *Cresswell*, for the defendant, therefore objected to its being read. ALDERSON, B., admitted it; and the plaintiffs had a verdict. *Cresswell* moved for a new trial in the ensuing term, on account of the admission of that evidence; and he cited *Jardine v. Paine*, 1 B. & Ad. 663, (20 E. C. L. R. 463.) PATTESON, J., mentioned *Coppock v. Bower*, 4 M. & W. 361, and *Walliss v. Broadbent*, 4 A. & E. 877, (31 E. C. L. R. 215.) The rule was afterwards made absolute by consent. The cause was tried again at the Liverpool Spring assizes, 1840, before ERSKINE, J. The guarantee was not produced, having been destroyed since the last trial; but the learned judge (assuming it not to have been stamped) allowed evidence to be given of its contents; and, on this ground, *Cresswell*, in the ensuing Easter term, moved for a new trial. (a) He referred to *Crisp v. Anderson*, 1 Stark. N. P. C. 35, (2 E. C. L. R. 283,) and *Gillet v. Abbott*, 7 A. & E. 783, (34 E. C. L. R. 221.)

Cur. adv. vult.

Lord DENMAN, C. J., in the same term (April 27th, 1840) delivered the judgment of the Court. This was an action on an agreement made in consideration of giving up a former guarantee. Plea, that the guarantee was not, in fact, given up. On a former trial, before ALDERSON, B., the paper in question was produced, without a stamp. The learned judge received the evidence; and we thought the case sufficiently doubtful to grant a rule for a new trial. The plaintiff submitted to its being made absolute; and a second trial took place before my brother ERSKINE at the last assizes. In deference to the former decision, which had not been overruled, but was only in a course of investigation, and, as we understand, with some intimation that he thought the evidence admissible, he received evidence that the paper (at the time of the trial destroyed) had been given up in an unstamped state, which raised precisely the same point. A motion for a new trial, on this ground, has now been made: but upon more consideration we agree in opinion with the two learned judges, and think that the paper, for the purpose for which it was produced, required no stamp.

The authority mainly relied on for the opposite doctrine is *Jardine v. Paine*: but the unstamped paper there was the very bill of exchange in respect of which the action was brought, and through which the plaintiff must have made out his title to recover. There was an attempt to resort to the unstamped paper to show the amount due, which would have been successful if the acknowledgment referring to it had been made to the plaintiff: but it was made to the holder of the bill.

(a) April 16th. Before Lord Denman, C. J., Little Dale, Patteson, and Coleridge, Ja.

and direct proof of the bill was therefore necessary. The principle of that decision may be taken from Lord TENTERDEN's words in giving judgment; it cannot be proved unstamped, as a security. Now the paper here called a guarantee was not wanted as a security, but as a description of the consideration for the defendant's promise. An inadequate security might, from various motives, be a very good consideration; and this document, if produced, might have been read to the jury to show that it answered the description in the declaration of a guarantee, though it was not a *binding* guarantee for want of a stamp. If the defendant had simply pleaded that the guarantee was without a stamp, such plea would have been held bad on demurrer.

Rule refused.

The plaintiffs having signed judgment, error was brought in the Exchequer Chamber, and the judgment below was affirmed. The arguments, and judgment of the Court of Error, may conveniently be inserted here.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

BROOKS against HAIGH and Another.—p. 323.

THE writ of error set out the pleadings, of which the material part is stated in the preceding report. The errors assigned were, that the declaration is insufficient, and that the judgment was for the plaintiffs below, whereas it ought to have been for the defendant. The writ of error was argued in Trinity vacation, (June 22d,) 1840, before Lord ABINGER, C. B., BOSANQUET, COLTMAN, and MAULE, J., and ALDERSON and ROLFE, Bs.

*Sir J. Campbell, Attorney General, for the plaintiff in error, the defendant below, contended, on the authorities before cited, that the original guarantee was void, being on a consideration executed, and not alleged to have been executed at the defendant's request. [ALDERSON, B. Is not it ambiguous whether the words, "in consideration of your being in advance," refer to the being already in advance, or being so in future?] The language is unambiguous, and will not bear a prospective construction. *Boehm v. Campbell*, 3 B. Moore, 15; S. C. 8 Taunt. 679, (4 E. C. L. R. 245,) was decided while a doubt still prevailed as to the doctrine of *Wain v. Warlters*, 5 East, 10; but in *Boehm v. Campbell* the Court of Common Pleas thought that the consideration of forbearance sufficiently appeared by the written agreement. Here it is neither stated in the guarantee, nor necessarily to be collected from it; *Raikes v. Todd*, 8 A. & E. 846, (35 E. C. L. R. 546,) therefore, is an authority for the defendant below. Then no action would have lain on this guarantee; and, if so, is the giving it up sufficient consideration for a new promise? Such an act is no consideration unless the thing given up be of some merchantable value. Thus, in Com. Dig., *Action upon the Case upon Assumpsit*, (F 8,) (cited by HOLROYD, J., in *Longridge v. Dorville*, 5 B. & Ald. 123, (7 E. C. L. R. 43,) it is said that the action

does not lie upon a promise "in consideration of a surrender of a lease at will; for the lessor might determine it." There is, indeed, a qualification added; "unless there was a doubt, whether it was a lease at will, or for years:" but even then, unless the doubt were a very reasonable and well-grounded one, the action would fail. In *Smith and Smith's Case*, 3 Leon. 88, the alleged consideration for an assumpsit was, that the promise "would commit the education of his children, and the disposition of his goods after his death during the minority of his said children, for the education of the said children," to the defendant; and this was held not sufficient, the consideration being only to have the disposition of the goods for the benefit of the children, and not for the defendant's profit. There must be some advantage to the promissor, or detriment incurred by the promisee at his request. [MAULE, J. It need not be pecuniary. Lord ABINGER, C. B. In *Smith and Smith's Case*, the suggestion in support of the consideration was that the defendant was to reap a pecuniary advantage, which the Court would not presume, because his doing so would have been a breach of trust.] The advantage must be such as can be appreciated in a Court of law. There are many cases in which promises in consideration of forbearance to sue have been held void, where there was no suit that could have been forborne: *Tooley v. Windham*, Cro. Eliz. 206; *Barber v. Fox*, 2 Saund. 136; *Loyd v. Lee*, 1 Stra. 94. It is true that the giving up a doubtful point of law has been held a good consideration, as in *Longridge v. Dorville*; and it may be so where a reasonable doubt exists; but in this case there could be no doubt on the invalidity of the first guarantee. [ALDERSON, B. What is the ground on which the giving up a doubtful point of law is a consideration? To whom must it be doubtful? The Court which decides upon the assumpsit must be supposed capable of deciding the point of law.] There is a degree of uncertainty which the Courts will notice. [MAULE, J., referred to *Jones v. Randall*, 1 Cowp. 37.] In *Stracy v. The Bank of England*, 6 Bing. 754, (19 E. C. L. R. 224,) the point which might have been litigated was one of great nicety and difficulty. TINDAL, C. J., in his judgment, so describes it. The argument on moral obligation can apply only to the first guarantee; the terms of the declaration do not admit of its being extended to the second. And on the first guarantee no consideration appears, except the general obligation to perform a promise.

The Court below, in their judgment, argue that the words "in consideration of your being in advance" might mean "on condition of your being in advance;" and suggest, as rendering this probable, that the plaintiffs must have come under the advance at the defendant's request; a supposition not confirmed by any thing which appears on the record: and they ground upon it the observation, "Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price." They also say: "Whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters*, 5 East, 10, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise." [MAULE, J. The record does not show that any document was in the plaintiff's possession. "Giving up" the guarantee might be

merely relinquishing the contract. ALDERSON, B. If they held a written guarantee, it might have been given up by cancelling merely.] The Court below argue that the defendant cannot be justified in breaking his promise by discovering that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it. "It cannot be ascertained;" they say, "that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge." But this reasoning would support a promise even in such a case as *Barber v. Fox*. The plaintiffs contend that trover would have lain for the paper; but it may be inferred, even from *Scott v. Jones*, 4 Taunt. 865, that this would not be so unless the paper had some real value.

Sir *W. W. Follett*, contrâ. As to the observation that no actual delivery of a written paper appears, if that were considered important, the plaintiffs would ask leave to amend. The point was not taken on the former argument; and, when the declaration speaks of giving up a guarantee, which it describes as "*then held*" by the plaintiffs, it cannot reasonably be supposed that nothing is meant but foregoing an engagement. Supposing that no action would have lain on the first guarantee, here is an agreement between persons competent to make contracts, without imputation of fraud on either side, by which one is to give up an undertaking signed by the other, and the other, in consideration of it, is to provide for certain bills. It is assumed, without reason, that the defendant's only object in desiring to have the guarantee back must have been to prevent an action. He might not choose that his name should remain abroad in the mercantile world, annexed to such a document. It implies an admission which he might think proper to recall. He might not wish, if sued, to be put to a defence on the Statute of Frauds. If he attached a value to the document from any cause, however inadequate, as a man might be willing to give an immoderate price for a picture or autograph, the Court will not inquire into the goodness of the bargain. Giving up any thing of which they were possessed was a disadvantage to the plaintiffs; and the defendant here was benefited by it. The case, therefore, differs from that of a mere forbearance to sue, where nothing is given and received. The law of *Smith and Smith's Case*, 3 Leon. 88, may be doubted. If the promisee there complied with terms by which the defendant obtained something from him, although those terms could not authorize the making of any illegal profit, it would seem that the defendant was bound.

But an action here might have been maintained on the first guarantee. The doctrine of *Wain v. Warlters* cannot now be disputed, though the decision may be regretted as going beyond the objects contemplated by the Statute of Frauds. But the consideration, though it must be stated, need not be set forth with all the accuracy of special pleading; *Raikes v. Todd*, 8 A. & E. 846, (35 E. C. L. R. 546,) shows this. And, unless the written agreement is so expressed that it must necessarily have been a nudum pactum, those relying upon it may show, by the situation of the parties and by other extrinsic circumstances adduced in evidence, that a valid consideration was contemplated. "In consideration of your being in advance," may refer to future advances; and the plaintiffs might show that it did so, by evidence that at the time of making the promise there had been no advance. Even if the advance were a past one, the language, which is that of the party promising,

will be taken most strongly against himself, and may be presumed to mean that the advance was at his request. It is clear, from several cases, that the Courts, in estimating the consideration of a written agreement, will look at the extrinsic circumstances. This was so, to a certain extent, in *Morris v. Stacey*, Holt, N. P. C. 153, (3 E. C. L. R. 58;) TINDAL, C. J., refers to such circumstances in *Stracy v. The Bank of England*, 6 Bing. 754, (19 E. C. L. R. 224;) so also does RICHARDSON, J., in *Boehm v. Campbell*, 3 B. Moore, 15. In *Newbury v. Armstrong*, 6 Bing. 201, (19 E. C. L. R. 55,) TINDAL, C. J., took into consideration the probable state of facts, as he inferred it from the terms of the guarantee; and that inference might clearly have been supported or varied by other proof. In *Shortrede v. Cheek*, 1 A. & E. 57, (28 E. C. L. R. 37,) the guarantee required, as consideration for the defendant's promise, that the plaintiff should withdraw "the promissory note;" and this was alleged in the declaration to have been a note given to the plaintiff by one Henry Cheek, which note was proved to have been so given. It was urged that the statement of consideration on the guarantee was uncertain, because it did not refer to this note in particular: but the Court held otherwise; and LITLEDAL and PARKE, Js., observed that, on the evidence, only one note had appeared to be in question. So, here, it might be shown by evidence that there was no advance in question, prior to the guarantee. *Raikes v. Todd* is, in principle, an authority for the plaintiffs below. The declaration there stated, as a consideration for the alleged promise, future advances, and not a forbearance in respect of advances past; had the count been properly framed, it might have been shown by evidence that the guarantee had, in fact, reference to both. The guarantee itself was not impeached. The Court of Exchequer acceded to the doctrine of that case in *Kennaway v. Trevelan*, 5 M. & W. 498, (where they held that the consideration was sufficiently disclosed;) and *Newbury v. Armstrong* was there relied upon as an authority.

Supposing, however, that an action would not have lain on the first guarantee, yet, if the law upon the subject was doubtful, (though *Boehm v. Campbell*, 3 B. Moore, 15; S. C. 8 Taunt. 679, (4 E. C. L. R. 245,) makes it clear on the side of the plaintiffs,) and the parties, upon that doubt, entered into a bargain for the abandonment of the guarantee, such bargain, made with a knowledge of all the facts, is binding; *Longridge v. Dorville*, 5 B. & Ald. 117, (7 E. C. L. R. 43;) *Stracy v. The Bank of England*; Com. Dig., *Action upon the Case upon Assumpsit*, (F 8,) referring to 1 Roll. Abr. 23, *Action sur Case*, (V,) pl. 27, 28. (a) It is indeed asked, who is supposed to entertain the doubt in point of law? But matters of law may be considered as doubtful to the Courts; and arrangements in equity are often made on the ground of the law being doubtful. [BOSANQUET, J. A point may be considered so, on which learned men differ. Lord ABINGER, C. B. It is carrying fiction too far, to say that the Courts must always know how the law will be.] The parties here have made their contract on a consideration which they, knowing all the facts, thought beneficial; and this is enough. Merchantable or pecuniary value, in any more limited sense, it is not to be insisted upon. The case falls within the principle of *Stevens v. Lynch*, 12 East, 38, and also within that of *Lee v. Mug-*

(a) Comyns refers to *Kent v. Prat*, Brownl. & Gld. 6, the case cited by Rolle. But it does not appear that any doubtful point of law was there contemplated.

geridge, 5 Taunt. 36, (1 E. C. L. R. 10,) and other decisions which have turned upon moral obligation. It results from all these authorities that, if parties, having made an engagement which ought to bind them, but is incapable of being enforced, replace it by another, that new engagement is valid in law. If the contrary doctrine could prevail, what limit would there be to objections? Would a second or third renewal of guarantees be void on account of the original defect?

Lastly, as was contended below, if the consideration amounts to no more than the delivering up of a paper at the defendant's request, the Court cannot say that it is insufficient. If they do, at what point will they allow sufficiency of consideration to begin? Would the giving up an autograph, or a horse, or dog of no merchantable value, be sufficient? [Lord ABINGER, C. B. The Attorney General cited the case of a lease at will.] That relates to a surrender, not the giving up of a document. Papers, though ineffectual for the purpose contemplated in drawing them up, may have a value from the mere wish of a party to get them into his own hands. [ROLFE, B. The lord chancellor has said that he will never compel the giving up of an instrument which is void on the face of it.] An application in equity for that purpose is very different from the enforcing of a bargain to give up something which is considered valuable. [BOSANQUET, J. Is not the document property, however small the value?] Yes; and trover would lie for it. In *Wilkinson v. Oliveira*, 1 New Ca. 490, (27 E. C. L. R. 468,) it was held sufficient consideration, for a promise to pay 1000*l.*, that the plaintiff, being possessed of a certain letter, had given it to the defendant. It is true, that the defendant was alleged to have made a beneficial use of the letter; but that was not an essential part of the consideration. Here the defendant could judge of the value of the document, and, using his judgment, made the promise. He cannot now annul it on the ground that the instrument was of no value.

Sir *J. Campbell*, Attorney General, in reply. The last argument rests on a fallacious assumption. The bargain declared upon was, not for the delivery of a piece of paper, but for the release of a contract. It does not appear that the paper itself may not even now be in the plaintiffs' possession. The plea, that the guarantee was of no effect, agrees with this view of the case. The main argument on the other side, assuming the first guarantee to be void, is, in effect, that, because it was given up at the defendant's request, he is estopped from saying that such an abandonment was no consideration for his promise. But this is contrary to the principle of many placita in Com. Dig., *Action upon the Case upon Assumpsit*, (F 8,) already cited. On those authorities, if the right foregone was in reality null, it cannot be material that the parties made their agreement on a contrary supposition. The question, therefore, really is, whether the first guarantee was valid or not. It is established by *Wain v. Warlters*, 5 East, 10, that, under the Statute of Frauds, no notice can be taken of a consideration not in writing; and in no instance has a guarantee been held good, where a sufficient consideration did not appear on the face of the instrument. In *Kennaway v. Treleavan*, 5 M. & W. 500, PARKE, B. says, "I accede to the doctrine laid down by Lord DENMAN, in the case of *Raikes v. Todd*, 8 A. & E. 846, (35 E. C. L. R. 546,) which has been referred to, that, in all these cases, the proper course is to look at the instrument, and see whether the consideration stated in it, be the same with that

alleged in the declaration, and no other." Here the attempt is to vary the consideration appearing on the instrument by parol evidence, which would virtually repeal the Statute of Frauds as to this point. It was not suggested in *Raikes v. Todd*, that the statement of consideration could be explained by oral testimony. TINDAL, C. J., in his judgment in *Hawes v. Armstrong*, 1 New Ca. 761, (27 E. C. L. R. 565,) lays it down that the consideration must appear by the writing itself, if not in terms, yet so "that any person of ordinary capacity must infer from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given." Here the instrument, unassisted by extrinsic evidence, discloses no legal consideration. A past consideration would be none, unless a request were shown. The second guarantee does not show even a probability that the advance therein referred to was an advance at the defendant's request. And the words "in consideration of your being in advance," do not bear out the supposition that a future advance was contemplated. In *Morris v. Stacey*, Holt, N. P. C. 153, (3 E. C. L. R. 58,) the consideration relied upon was collected from the guarantee itself; and in *Boehm v. Campbell*, 3 B. Moore, 15, DALLAS, C. J. and BURROUGH, J., refer to the written instrument only. [ALDERSON, B. In both those cases the undertaking related to a debt already due; the consideration of forbearance might be inferred from that fact.] In *Shortrede v. Cheek*, 1 A. & E. 57, (28 E. C. L. R. 37,) the consideration was executory, and appeared sufficiently by the guarantee. *Stevens v. Lynch*, 12 East, 38, where the holder of a bill had given time to the acceptor, and the drawer waived the benefit of that circumstance, is not applicable to the present case. As to *Lee v. Muggeridge*, and the other cases which have turned upon moral obligation, it is sufficient to say that here no moral obligation appears for the first guarantee, and the declaration does not allege any consideration for the second guarantee but the abandonment of the first.

Cur. adv. vult.

LORD ABINGER, C. B., in the same vacation (June 29th) delivered the judgment of the Court.

In the case of *Brooks v. Haigh*, the judgment of the Court is, to affirm the judgment of the Court of Queen's Bench.

It is the opinion of all the Court that there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract, and, therefore, this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my brother MAULE, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guarantee was written was given up; and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents.

Judgment affirmed

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The QUEEN against JOHN HUMPHEREY, Esquire.—p. 335.

Under stat. 9, G. 4, c. 17, sects. 2 and 3, which require that every person who shall be placed, elected, or chosen in or to the office of alderman, &c., shall, within one calendar month next before or upon his admission into such office, make and subscribe a certain declaration before certain parties, and sect. 4, which enacts, that, if he shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void :

Held, by the Court of Queen's Bench, that the election was not void by refusal to make the declaration, or state whether the party will do so, unless he has first been admitted to the office by swearing in.

Judgment reversed on error, by the Court of Exchequer Chamber.

Held by that Court, that the statute does not give the party elected a month at all events for deciding whether he will make the declaration or not, but only excuses him from making it at the time of admission, if he has made it within a month before.

That the words "upon his admission" mean at the time, and not within a reasonable time after, and that the authorities who admit may prescribe the order in which the ceremonies forming parts of the admission shall take place.

And that if the party offers himself to the proper Court to be admitted, not having made the declaration within a month before, and, being asked whether he will make it or not, declines to say but requires the Court to admit him, which they refuse, the election is thereupon void, and a procept may issue for a new election.

INFORMATION in the nature of quo warranto, for using and exercising the office of an alderman of the city of London.

Plea, stating, first, the rights and customs and (in part) the by-laws, 21 R. 2, and 13 Ann.,^(a) of the city of London as to the election of aldermen, and the enactments of stat. 9 G. 4, c. 17, ss. 2, 3, 4,^(b) that every person who shall thereafter be placed, elected, or chosen, in or to the office of mayor, alderman, &c., shall, within one calendar month next before or upon his admission into any of the aforesaid offices, &c., make and subscribe the declaration specified in sect. 2, before the persons mentioned in sect. 3; and that if any person placed, &c., into any of the aforesaid offices or places shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, &c., shall be void, and it shall not be lawful for such person to do any act in the execution of the office, &c. The plea then stated,

That, since the making and passing of the said act of parliament made and passed in the ninth year aforesaid, the said court of mayor and aldermen have required of every person who, since the passing of the said act, has been elected or chosen in or to the office of alderman of any ward of the said city that such person should make and subscribe the said declaration prescribed by the said act previously to taking and subscribing the oaths of office according to the several laws made and now in force for that purpose, to wit, at the city of London aforesaid; "That, a vacancy having occurred in the place and office of alderman of the ward of Aldgate aforesaid, by the death of John Thomas Thorpe, Esq., late alderman thereof, a court of wardmote was holden on Tuesday, the 17th day of November, A. D. 1835, and continued by adjourn-

^(a) These by-laws were cited exactly as they appear in *Rex v. Johnson*, 5 A. & E. 489, (31 E. C. L. R.)

^(b) More fully stated, p. 344, post.

ments on other subsequent days in and for the said ward, before the Right Honourable William Taylor Copeland, then mayor of the said city, by virtue of a certain precept for that purpose before then duly issued according to the custom of the said city, for the election of an alderman of the said ward in the room and stead of the said John Thomas Thorpe; at which said court of wardmote one David Salomons, citizen and cooper, the said defendant, citizen and tallow chandler, and one James Law Jones, citizen and haberdasher, were respectively candidates for the said vacant place and office of an alderman of the ward of Aldgate aforesaid, to wit, at," &c.: "That, at the said last-mentioned court of wardmote, divers persons, inhabitants of the said ward, being a majority of those then present at the said court, voted for the said David Salomons as and for such alderman, and by reason thereof the said D. S. claimed to be duly elected into the said place and office of alderman so vacant as aforesaid: and a return to the said precept, and of the result of the said election, was afterwards, to wit, on the 24th day of November, A. D. 1835, made into the said court of mayor and aldermen then duly holden in the Guildhall of the said city, according to the custom of the said city in that behalf, to wit, at," &c.: "That afterwards, to wit, on the 3d day of December, A. D. 1835, to wit, at," &c., "at a court of mayor and aldermen then holden at the Guildhall in and for the said city, the said D. S. did tender himself to the said court of mayor and aldermen at the said last-mentioned court for admission, and did then and there make claim, and did require, to be admitted to the said office of alderman of the said ward of A. as aforesaid; and thereupon the said D. S. was then and there requested by the said court of mayor and aldermen to make and subscribe in their presence the said declaration in the said act mentioned, the said mayor and aldermen then being the persons in the presence of whom, by the usage of the said city, the said declaration should be made and subscribed according to the provisions of the said act of parliament in that behalf, according to the several laws made and now in force for that purpose; but that the said D. S. did not, nor would, at the said court of mayor and aldermen so holden as last aforesaid, nor at any time within one calendar month next before or upon his admission, according to the true intent and meaning of the said act, into the said office of alderman of the said ward of A. as aforesaid, or at any other time whatsoever, make and subscribe the said declaration, but wholly omitted and neglected so to do: by reason whereof, and by force of the said statute in that case," &c., "the placing, election, and choice of the said D. S. into the said place and office of alderman of the said ward of A., as aforesaid, became and was void, to wit, at," &c.: "That, the said D. S. so having omitted and neglected to make and subscribe the said declaration required by the said act of parliament, the said court of mayor and aldermen, so holden as last aforesaid, did thereupon, at the said last-mentioned court, declare and adjudge the election of the said D. S. into the said place and office of alderman of the said ward of A. as aforesaid to be void, and did also then and there resolve that a fresh precept should issue for a court of wardmote to be held for the election of a fit and proper person to be alderman of the said ward of A. in the room and stead of the said John Thomas Thorpe, Esq., deceased, to wit, at," &c.: "That, the said vacancy in the said place and office of alderman of the said ward of A., by the death of the said John Thomas Thorpe, Esq., not having been filled up, a cer-

tain other court of wardmote was holden on Tuesday the 8th day of December, A. D. 1835, in and for the said ward of A., before the Right Honourable William Taylor Copeland, then mayor of the said city, by virtue of a certain other precept for that purpose before then duly issued according to the custom of the said city, for the election of an alderman of the said ward in the room and stead of the said J. T. T. Esq., deceased; in which last-mentioned precept it was stated that David Salomons, Esq., returned to the court of mayor and aldermen to be alderman of the said ward, having(a) omitted and neglected to make and subscribe the declaration directed to be made and subscribed by the said act of parliament made and passed in the ninth year of the reign aforesaid in manner in the said act mentioned, by reason whereof(a) the election of the said D. S. had, by virtue of the said act, become void, to wit, at," &c. "That at the said last-mentioned court of wardmote this defendant, citizen and tallow-chandler, was the only candidate for the said place and office of an alderman of the said ward of A., to wit, at," &c. "That at the said last-mentioned court of wardmote divers persons, being inhabitants of the said ward, and being a majority of those then present at the said court, voted for the defendant as and for such alderman; and by reason thereof the said defendant was duly elected into the said place and office of alderman of the said ward of A., so vacant as aforesaid, and a return to the said last-mentioned precept, and of the result of such last-mentioned election, was afterwards, to wit, on the 17th day of December, A. D. 1835, made unto the said court of mayor and aldermen then holden in the Guildhall of the said city, according to the custom of the said city in that behalf, to wit, at," &c. The plea then stated that at the last-mentioned court, holden, &c., that is to say on December 17th, 1835, the defendant appeared before the court, and, having made and subscribed the declaration, was then and there duly sworn and admitted, &c., and then and there took and subscribed the oaths, and made and subscribed the declaration according to the several laws made for that purpose; by reason of which several premises he the defendant then and there took upon himself the said place and office, &c., and from thence continually, &c., and by that warrant, &c. Traverse of the usurpation. Verification.

Replication. That by the said by-law of 13 Ann. "it was also enacted that, in case the person so duly elected alderman, and returned, by the Lord Mayor or other person duly authorized to hold such wardmote, to the said court of mayor and aldermen within the time for that purpose by the laws of the said city limited and appointed, should refuse to take upon him the said office, and unless he could discharge himself therefrom by the laws of the said city, he should be subject to all the pains and penalties which might be inflicted on him by the by-laws and customs of the said city." That, by an act of Common Council of 17th April, 52 G. 3, it was, amongst other things, enacted, "that, upon any vacancy by death or resignation of any person being an alderman of the said city of London, the lord mayor of the said city for the time being should, within eight days next after such death or resignation, Sundays excepted, cause a wardmote to be duly summoned and held for the election of a fit and able person to be alderman of such ward or wards respectively where such vacancy should happen, and returning such person so elected to the said court of lord mayor and aldermen of the said city. And

that by the said act of common council it was also enacted that, if any person free of the said city should be thereafter duly elected alderman of any of the said wards of the said city according to the custom of the said city, and, notice of such election being given to him, or left in writing for him at the last place of his abode, shall not personally appear before the court of the lord mayor and aldermen for the time being, in the Inner chamber of the Guildhall of the said city at the next court there to be holden, not having a reasonable excuse for such his not appearance, and then and there to take upon himself the said office and charge of alderman of the said city and of the said ward whereof he shall be elected alderman, or if such person so elected shall, before the court of lord mayor and aldermen, openly declare his refusal to take upon him the said office, then any such person who shall so neglect or refuse to appear, or who appearing shall declare his refusal as aforesaid, shall forfeit the sum of 500*l.* of lawful," &c., "to the use of the mayor and commonalty and citizens, unless he shall be duly discharged of the said office of alderman for defect or want of ability in wealth, upon oath taken as by the said act of common council is required, which said forfeiture and penalty is by the said act declared to be recoverable by an action of debt in the name of the chamberlain of the said city for the time being in any of his Majesty's courts of record." "That, after the said return to the said precept, and of the result of the said election, was made to the said court of the mayor and aldermen, a certain notice in writing was served upon the said David Salomons by an officer of the said court of mayor and aldermen, personally to appear before the said court on the 3d day of December last, at the Guildhall in the said city, and then and there to take upon himself such office and charge of alderman of the said ward: and that, in pursuance of the said notice, and in obedience to the said last-mentioned act of common council, he, the said D. S., did, on the said 3d day of December, and within the space of one month next after the day of his election to the said office of alderman of the said ward of A., present himself to the said court of mayor and aldermen, and then and there expressed his readiness and desire to be sworn for the due execution of the said office of alderman, and also to take and subscribe the oaths according to the said laws made for those purposes, and to assume and take upon himself the duties and burthen of the said office, and did there demand and make claim to be admitted alderman of the said ward of A. by virtue of the said election, and of the return thereof duly made as aforesaid to the said court." "That, when he the said D. S. so appeared and presented himself to the said court pursuant to the said notice, the said court demanded of him, the said D. S., whether he had signed the declaration required by the said act of Parliament made and passed in the 9th year," &c., "entitled," &c., (9 G. 4, c. 17,) "within the space of one month next before his then application for admission, to which the said D. S. then answered that he had not; whereupon the said court demanded of him the said D. S. whether he would make and subscribe the said declaration: whereupon the said D. S. declined to say whether he would or not, but required the said court of mayor and aldermen to admit him to the said office, which the said court of mayor and aldermen did then and there, and within the space of one month from the day of the election of the said D. S. to the office of alderman of the said ward, positively refuse to do; and the said court of aldermen did then and there declare the election of the said D. S. to

the said office to be null and void, and thereupon directed a precept to issue from the said court for the election of another alderman for the said ward of A." And "that afterwards, to wit, on the 5th day of December, and within the space of one month next after the election of the said D. S., and the return thereof to the said court of mayor and aldermen, a certain precept issued from the said court of mayor and aldermen, and that by virtue thereof a certain court of wardmote was, on the 8th day of the said month, and within the space of one month next after the election of the said D. S. as aforesaid, holden for the said ward of A., before W. T. Copeland, then mayor of the said city, for the purpose of electing an alderman of the said ward, at which said last-mentioned wardmote the said John Humphery was declared to be elected alderman of the said ward of Aldgate. Verification.

General demurrer, and joinder. (There were other matters replied, as to which issues of fact were joined.) The demurrer was argued in the Court of Queen's Bench in Easter term, 1838.(a)

Sir *J. Campbell*, Attorney-General, for the defendant. The question is, whether Mr. Salomons had a right to be admitted without making the declaration. If not, the office was void, and the defendant was rightly elected; if Mr. Salomons had such a right, the office was not void, and judgment must be given for the Crown. If he could claim to be so admitted, stat. 9 G. 4, c. 17, s. 2, will be inoperative; and stat. 5 & 6 W. 4, c. 28, was needless.

By 2 stat. 13 C. 2, c. 1, s. 12, it is enacted that, after the expiration of the commission of the then corporation commissioners, "no person or persons shall for ever hereafter be placed, elected, or chosen, in or to any the offices or places aforesaid" (including aldermen, and other persons bearing employment relating to the government of corporations, sect. 4,) "that shall not have within one year next before such election or choice, taken the sacrament of the Lord's Supper, according to the rites of the Church of England;" "and in default hereof, every such placing, election, and choice is hereby enacted and declared to be void." This provided a preliminary test for officers. Then a subsequent test is provided by stat. 25 C. 2, c. 2, s. 2, which enacts, with respect to every person that shall be "admitted, entered, placed, or taken into any office or offices civil or military," that "all and every such person and persons so to be admitted as aforesaid, shall also receive the sacrament of the Lord's Supper, according to the usage of the Church of England, within three months after his or their admittance in or receiving their said authority and employment, in some public church," &c. And stat. 16 G. 2, c. 30, s. 3, enlarges the time given by the last-mentioned act from three months to six months.

Stat. 9 G. 4, c. 17, recites these acts, and repeals them so far as relates to taking the sacrament. It then provides substitutes, first by ss. 2, 3, 4, for the preliminary test, and next, by sect. 5, for the subsequent test. Sect. 2 recites that "it is just and fitting, that on the repeal of such parts of the said acts as impose the necessity of taking the sacrament of the Lord's Supper according to the rites or usage of the Church of England, as a qualification for office, a declaration to the following effect should be substituted in lieu thereof," and enacts that every person who shall thereafter be placed, elected, or chosen in or to the office

(a) April 25th and 27th, before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Ja.

of alderman, &c., "or in or to any office of magistracy, or place, trust, or employment relating to the government of any city, corporation, borough, or cinque port within England and Wales or the town of Berwick-upon-Tweed, shall, within one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following:" which is the declaration, upon the true faith of a Christian, that the party will not exercise any power, authority, or influence, which he may possess by virtue of the office, to injure or weaken the Church, &c. Sect. 3 enacts "that the said declaration shall be made and subscribed as aforesaid, in the presence of such person or persons respectively, who, by the charters or usages of the said respective cities," &c., "ought to administer the oath for due execution of the said offices or places respectively, and in default of such, in the presence of two justices of the peace of the said cities," &c., "if such there be, or otherwise in the presence of two justices of the peace of the respective counties, ridings, divisions, or franchises wherein the said cities," &c., are; "which said declaration shall either be entered in a book, roll, or other record, to be kept for that purpose, or shall be filed amongst the records of the city," &c. Sect. 4 enacts "that if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed." Sect. 5 enacts "that every person who shall hereafter be admitted into any office or employment, or who shall accept from his Majesty, his heirs and successors, any patent, grant, or commission, and who by his admittance into such office or employment or place of trust, or by his acceptance of such patent, grant, or commission, or by the receipt of any pay, salary, fee, or wages by reason thereof, would, by the laws in force immediately before the passing of this act, have been required to take the sacrament of the Lord's Supper according to the rites or usages of the Church of England, shall, within six calendar months after his admission to such office, employment, or place of trust, or his acceptance of such patent, grant, or commission, make and subscribe the aforesaid declaration, or in default thereof his appointment to such office, employment, or place of trust, and such patent, grant, or commission, shall be wholly void."

Now, in interpreting sects. 2, 3, 4, which provide the substitute for the preliminary test, the only sound principle must be to understand the enactments of those sections as creating a preliminary test also. Therefore, as, by 2 stat. 13 C. 2, c. 1, s. 12, the election of any person not having, within one year before the election, taken the sacrament, is declared void, so the admission of any party not having, before the admission, made the declaration, would be void also. And the words of stat. 9 G. 4, c. 17, s. 2, "within one calendar month next before or upon his admission," must be understood to point to something to be done antecedently to the actual admission. The word "upon" is ambiguous in itself: it may mean "after," "concurrently," or "before." If a rule be made absolute for a new trial upon payment of costs, the costs should regularly be paid before the new trial takes place. [LITLEDAL, J. "Upon" there rather means "on condition of."] It would mean a condition precedent. [PATTESON, J. According to your

argument the declaration here should follow the admission.] The use of the word is various; here it seems to mean either "at the time," or "before." [COLERIDGE, J. If it meant "before," the words would mean one month "before or before the admission."] "Upon" would not then be merely superfluous: the effect of the enactment would be that the party, if he had not made the declaration within one month of the admission, must do it immediately before the act of admission. Or it might mean "at the time of" the admission. Then the order in which the concurrent acts of a single proceeding are to take place is clearly to be regulated by the party presiding over such proceeding. Therefore the court of aldermen were justified in treating Mr. Salomons's refusal, either to make the declaration or to say whether he would or would not make it, as a refusal to make it at the time of the admission; so that the election, by sect. 4, was void.

It may be argued that "one calendar month next before or upon his admission" means a month before or a month after: and that, therefore, Mr. Humphery ought not to have been elected and admitted within the month, Mr. Salomons having that time for making the declaration. But this construction is not borne out by the language; nor can the legislature be supposed to have meant that a party, after his election, should have a month given him for the purpose of considering his religious or other objections to the declaration. He is supposed to be qualified at the time of the election. What was to be done, as to the office, in the mean time? It is immaterial how soon after Mr. Salomons's refusal the defendant's election took place.

Sect. 5 of stat. 9 G. 4, c. 17, provides a subsequent test, in lieu of the subsequent test given by stat. 25 C. 2, c. 2, s. 2, to the provisions of which it manifestly refers. This shows that sects. 2, 3, 4, of stat. 9 G. 4, c. 17, were intended to furnish a substitute for the enactments of 2 stat. 13 C. 2, c. 1, s. 12, which created a preliminary test. And, as sect. 5 of stat. 9 G. 4, c. 17, provides for making the declaration within six months after the admission, it cannot be supposed that sect. 2 meant also to order a declaration to be made within one month after the admission. Sect. 2 relates to a declaration to be made before, sect. 5 to a declaration after, being admitted. [PATTESON, J. Was a person to make two such declarations? Do the enactments refer to the same persons? Did stat. 25 C. 2, c. 2, s. 2, relate to corporation officers?] The words are, "any office or offices civil or military," which clearly include corporation offices. If the words "by reason of any patent or grant of his majesty" are taken to govern all that precede, still offices in a chartered corporation are held under a grant of the crown, and so within the clause.

The legislature must have introduced stat. 9 G. 4, c. 17, with the knowledge that an annual Indemnity Act has always been passed since 1743. The Indemnity Act in force at the time of Mr. Salomons's election was stat. 5 & 6 W. 4, c. 11.(a) The act of indemnity, after reciting (among

(a) The same, in all parts material to the present case, with stat. 1 W. 4, c. 26, except as to dates. The enactment is, "That all and every person or persons who, at or before the passing of this act, hath or shall have omitted to take and subscribe the oaths and declarations, or otherwise to qualify him, her, or themselves, within such time and in such manner as in and by the said acts," (including 2 stat. 13 C. 2, c. 1, 25 C. 2, c. 2, 9 G. 4, c. 17, 10 G. 4, c. 7), "or any of them is required, and who, after accepting any such office, place, or employment, or undertaking any profession or thing, on account of which such qualification ought to have been had and is required, before the passing of this act hath or have taken and subscribed the said oath or made the declarations

others) 2 stat. 13 C. 2, c. 1, stat. 25 C. 2, c. 2, and stat. 9 G. 4, c. 17, indemnifies parties who have accepted office without taking the oaths or making the declaration in proper time, if they have subsequently done so, or do so by a day named, before which the next Indemnity Act always passes. Therefore, if Mr. Salomons had been admitted without making the declaration, the security intended by stat. 9 G. 4, c. 17, would never have taken effect at all.

Stat. 5 & 6 W. 4, c. 28, recites stat. 9 G. 4, c. 17, ss. 2, 4, and that there was a doubt whether these clauses applied to sheriffs of cities, or towns being counties; and it enacts that no person elected to such office of sheriff shall by reason thereof "be liable to make or subscribe the aforesaid declaration within one calendar month next before or upon his admission to the said office." But this would have been unnecessary, if an officer, under the enactments of stat. 9 G. 4, c. 17, s. 2, might postpone the declaration till after admission; since, after admission, he would have been protected by the annual Indemnity Act.

By the Roman Catholic Emancipation Act, stat. 10 G. 4, c. 7, s. 14, Roman Catholics are enabled to hold office, &c. in corporations, "upon" taking and subscribing the oath there set forth. It may be shown that this oath must be taken before admission; and sect. 2, as to members of either house of parliament, is to be construed in the same way. [Sir F. Pollock, for the Crown, assented to this.] The intention of the legislature must have been the same here as in stat. 9 G. 4, c. 17, though the expressions are not strictly alike.

It will be argued that Mr. Salomons is protected by the annual Indemnity Act. But he is not within its terms. He has not been admitted. The case which has gone farthest on these acts is *In the Matter of Steavenson*, 2 B. & C. 34, (9 E. C. L. R.,) where it was held that the act protected, not only those who had already incurred the penalties or disabilities, but all who should do so while the act was in force. There the party was elected and admitted after the act passed. But here the penalty has not been incurred at all; Mr. Salomons never has been in the office. [Lord DENMAN, C. J. Suppose he had a right to be

required by law, or who, on or before the 25th day of March, 1836, shall take and subscribe the oaths, declarations, and assurances respectively, in such cases wherein by the said several acts or any or either of them the said oaths, declarations, and assurance ought to have been taken and subscribed, in such manner and form, and at or in such place or places, as are appointed in and by the said several acts or any or either of them, shall be and are hereby indemnified, freed, and discharged from and against all penalties, forfeitures, incapacities, and disabilities incurred or to be incurred for or by reason of any neglect or omission, previous to the passing of this act, of taking or subscribing the said oaths or assurance, or making or subscribing the said declarations respectively, or taking or subscribing the said oath, according to the above-mentioned acts or any of them, or any other act or acts; and such person or persons is and are and shall be fully and actually recapitulated and restored to the same state and condition as he, she, or they were in before such neglect or omission, and shall be and be deemed and adjudged to have duly qualified him, her, or themselves according to the above-mentioned acts and every of them; and that all elections of, and acts done or to be done by, any such person or persons, or by authority derived from him, her, or them, are and shall be of the same force and validity as the same or any of them would have been if such person or persons respectively had taken the said oaths or assurance, and made and subscribed the said declarations respectively, and taken and subscribed the said oath, according to the directions of the said acts and every or any of them; and that the qualification of such person or persons qualifying themselves in manner and within the time appointed by this act shall be to all intents and purposes as effectual as if such person or persons had respectively taken the said oaths and assurance, and made and subscribed the said declarations respectively, and taken and subscribed the said oath, within the time and in the manner appointed by the several acts before mentioned."

admitted when he claimed.] This claim would not subject him to the penalty: and the act would still be inapplicable. But, further, Mr. Salomons cannot claim the benefit of the act, because he has not complied with the conditions; it is not alleged either that he has made the declaration, or that he is ready to do so. *Rex v. Parry*, 14 East, 549, shows what allegations are necessary to bring a party within the protection of the act.

Sir F. Pollock, contra. The question is, not simply whether Mr. Salomons had a right to be admitted before making the declaration, but whether his election was avoided by his refusing to answer the question, so that the Court were entitled to issue a precept for a new one.

The Indemnity Act has nothing to do with the interpretation of stat. 9 G. 4, c. 17. It has been, in fact, passed annually for a long time; but it does not thereby become part of the permanent law; and its operation is made temporary only, with the intention that it shall not constitute such part of the law. According to the view suggested on the other side, its effect would be altogether to repeal the laws on the subject of qualifications and tests.

The word "upon," in sect. 2 of stat. 9 G. 4, c. 17, cannot mean "before." Its proper meaning is "after," or "as a consequence of." Numerous meanings are assigned to it in Johnson's Dictionary: but "before" is not among them. There is indeed, "at the time of; on occasion of." But Johnson adds, "It always retains an intimation, more or less obscure, of some *substratum*, something precedent, or some subject." This agrees with the ordinary legal use of it, where the word is always followed by some condition or act which is to be precedent; as "a new trial upon payment of costs," where the payment of costs, as a condition or act, precedes the new trial. The argument that sect. 2 provided a substitute for that which, under the previous law, preceded the admission, namely, the taking the sacrament, cannot control the ordinary sense of the word, especially in the interpretation of an act which restricts general rights. But, further, the declaration was a substitute for all the tests before imposed. [PATTERSON, J.—The preamble in sect. 2 makes the declaration a substitute for taking the sacrament "as a qualification for office."] That does not show that the declaration is to precede the taking of office: it is a substitute for all that was required by 2 stat. 13 C. 2, c. 1, s. 12, and stat. 25 C. 2, c. 2, s. 2. Even assuming that the declaration was to be made at the time of admission, why was the question to be put before the admission? [COLERIDGE, J.—Were not the court of aldermen to regulate the order of proceedings?] If the declaration made a part of one transaction, concurrently with the admission, Mr. Salomons might, at any time while that court was sitting, make the declaration; therefore the precept which issued at the following court, in consequence of the resolution passed at the first court and the declaration there made that the election was void, was illegal. While the first court was sitting, the election could not be void. Even had Mr. Salomons, on the question being put, stated that he would not make the declaration, he might still have changed his mind, and have offered to do so while the first court was sitting. [COLERIDGE, J.—Suppose two persons had been elected to different offices, and each had refused to be admitted first, how could the court of aldermen proceed? What was to be done first?] That state of things did not in fact exist; and, had it arisen, it would have been premature to declare the election void. No

moment can be pointed out at which the election became void, until the first court had broken up. The by-law of 13 Anne does not avoid the election, even upon the refusal of the party to take upon him the office; it only imposes penalties. Besides, it does not apply to a party claiming admission. Had Mr. Salomons not appeared at all at the first court, the election would not have been void; and therefore the precept under which the defendant was elected would have been illegal. [LITTLEDALE, J. But Mr. Salomons did appear.] Still nothing passed, on his appearance, making the election null. There is no provision, by statute or by-law, avoiding the election under such circumstances; for stat. 9 G. 4, c. 17, s. 4, avoids it only upon the party's omission or neglect, and the refusal to answer the question is neither omission nor neglect to make the declaration. Neither can there be any common law principle avoiding the election. The court had no right to put the question; Mr. Salomons might answer, "You are to admit, and, upon my admission, I am to make a declaration; if I omit or neglect to do that, my election will be void: do your duty, and let me do mine." [COLERIDGE, J. If Mr. Salomons had refused to answer the question whether he had already made the declaration, could the court thereupon have declared the election void?] They clearly could not. [PATTERSON, J. Would you say that also as to the sacramental test, under 2 stat. 13 C. 2, c. 1, s. 12, which was necessarily taken before admission?] The court, who were to admit, would have had no right there to put the question; it was for the party admitted to see that he had done all necessary to make his admission good; and, supposing the court (if the case had occurred under that statute) to have adjourned without declaring the election void, Mr. Salomons might have claimed admission at the following court, and have made the declaration. But, according to the argument on the other side, had he been then admitted, he could have been ousted by a *quo warranto*, the election having been avoided by what occurred at the previous court; for the declaration of avoidance by the court of aldermen can make no difference. Possibly, if he had been admitted, and then refused to make the declaration, the election would have been thereby avoided: but that has not occurred.

Sir J. Campbell, Attorney-General, in reply. It must be taken, on this record, that Mr. Salomons refused to make the declaration. The plea states that, on being required to make and subscribe it, he did not, nor would, at the court, nor at any time within one calendar month next before or upon his admission, according to the true intent or meaning of the act, or at any other time whatsoever, make and subscribe the said declaration, but wholly neglected and omitted so to do, whereby the election became void, by force of the statute. This is not traversed, but only, to a certain degree, explained in the replication. There is, therefore, a refusal on the record; and the only question is, whether the refusal avoided the election.

It is denied, on the part of the Crown, that sect. 2 of stat. 9 G. 4, c. 17, points to a substitute for the prior test in 2 stat. 13 C. 2, c. 1, s. 12, rather than for the subsequent test in stat. 25 C. 2, c. 2, s. 2: but the prior test was the only one provided "as a qualification for office," which are the words used in the preamble to sect. 2 of stat. 9 G. 4, c. 17: it is, therefore, to that statute only that the section applies.

By 2 stat. 13 C. 2, c. 1, s. 13, it is enacted "that every person who shall be placed in any corporation by virtue of this act, shall upon his

admission take the oath or oaths usually taken by the members of such corporation." Could it be contended that the party was to be admitted first, and take the oaths afterwards? [Lord DENMAN, C. J. On comparing sect. 12 with sect. 13, it does not appear that any order of proceedings is prescribed.] The legal interpretation has always been that the oaths of office should be taken before the admission. [COLERIDGE, J. Does the admission consist in any thing besides administering the oath of office?] It seems to be a series of acts; the last probably is the subscription of the name in the books of the corporation. [COLERIDGE, J. Can that be essential to his being an alderman?] In the pleadings in quo warranto there were usually two issues, one traversing the swearing in, the other traversing the admission.

Then, the court of aldermen were bound to make the inquiry; for, by sect. 3 of stat. 9 G. 4, c. 17, the party, if he does not make the declaration before those who are to administer the oath of office, is to take it before justices. [Lord DENMAN, C. J. The words are "in default of such:" that looks as if what took place before those who administer the oath of office was not necessarily final.] Those words determine nothing as to the time; they show only before whom the declaration is to be made, whatever be the proper time. It cannot be contended that, after admission by the court of aldermen, the party could go and take the oaths elsewhere. [Lord DENMAN, C. J. Could the officer who admits defeat the election by quitting the court without receiving the declaration?] That case seems not to be provided for by the act. It is said that, under the old law, the party was not bound to answer the question whether he had taken the sacramental test; but that seems to be contrary to *Rex v. Hawkins*, 10 East, 211. [PATTERSON, J. Could he make the declaration previously to the court at which he is admitted? Can the words "in default" leave the matter to the option of the parties?] They seem to mean "in the place of." [Lord DENMAN, C. J. Suppose the party answered the question as to the sacramental test in the affirmative, must the Court have received his answer, or could they inquire further?] He would answer at his own peril. In *Rex v. Hawkins*, Lord ELLENBOROUGH, upon the authority of *Williams v. The East India Company*, 3 East, 192, considers that a party must be presumed to have taken the test, if he so declare. [PATTERSON, J. It was, in some cases, usual for the party to bring some one with him who had seen him receive the sacrament.] By stat. 25 C. 2, c. 2, s. 3, a certificate was required as to the subsequent test.

It is asked at what period the vacancy took place? It took place at the moment of the refusal being made. There is no occasion to inquire whether, if the Court had adjourned for the purpose of not allowing the proceeding to be final, the vacancy would have been consummated.

Cur. adv. vult.

Lord DENMAN, C. J., in the following term, (May 29th, 1838,) delivered the judgment of the Court. After stating the information, his Lordship proceeded as follows.

The question on the pleadings turned out to be, whether the office of alderman, to which the defendant was elected, was or was not vacant at the time of such election; and this mainly depended upon whether the court of aldermen had done right in refusing to admit Mr. Salomons, who had before been duly elected alderman of the same ward, and directing a new precept to go for the election of another alderman, under

which new precept the defendant was elected. The ground of their refusal to admit him was, that he had forfeited his office by the operation of the statute 9 G. 4, c. 17, inasmuch as he had not made the declaration required by that statute within a month, and, when questioned, declined to answer whether he was willing to make it on being admitted.

On looking at the statute, we are of opinion that, as the declaration is to be made upon admission, and to be made in the presence of those who by charter or custom are to administer the oaths of office, the admission is the first thing to be done; that the Court of aldermen ought to have admitted him by administering the oaths of office; that he, when so admitted, had the option of making or declining to make the declaration; and that, till he had declined upon admission, none of the consequences attached by the act to refusal accrued. We therefore think the office was not vacant at the time when the precept issued, and of course that the defendant has not been well elected. Our judgment must be for the Crown. Judgment for the Crown.

A writ of error was brought upon this judgment. The errors assigned were, that the plea first pleaded in reply was insufficient in law: that, when the precept issued on December 5th, 1835, for electing an alderman of the ward of Aldgate, the said office was vacant, and that the election of the said John Humphery thereupon was legal and good: and that judgment was given for the Crown, whereas, &c., (the common assignment of error.) The writ of error was argued in Hilary vacation, 1839, February 4th, before TINDAL, C. J., BOSANQUET, VAUGHAN, and COLTMAN, Js., and PARKE, ALDERSON, and GURNEY Bs.

Sir *J. Campbell*, Attorney-General, for the plaintiff in error, the defendant below. The judgment of the Court below repeals the clauses of 9 G. 4, c. 17, which require a declaration in lieu of the sacramental test, and defeats the purpose of the legislature, which was, when abolishing that test, to provide, by means of the substituted declaration, that the offices specified should not be filled by persons who could not profess that they were Christians. Such a construction is inconsistent with the policy of stat. 5 & 6 W. 4, c. 76, s. 50, which retains the declaration, and would have made it needless to introduce the act 5 & 6 W. 4, c. 28, which was passed on Mr. Salomons being elected sheriff of London. It is contended for the Crown that the practice alleged in the plea to have prevailed ever since the statute 9 G. 4, c. 17, was passed, of requiring every person elected alderman to subscribe the declaration before taking the oaths of office, is illegal, and that the party elected may require the oaths to be administered first. The defendant insists that, if administering the oaths is the admission, and it is consummated by that act, the declaration ought to be made first; and, further, if it is necessary to argue that point, that the declaration is part of the ceremonies of admission; that the admission is not consummated without it; that the lord mayor and aldermen may direct the order in which the ceremonies shall be performed; and that, if they require the declaration to be made first, and the party elected refuse then to make it, the election is thereby void.

As to the first point; the judgment of the Court below does not enter into any discussion of the statute 9 G. 4, c. 17, of the other acts in pari materia, or of the Indemnity Acts; and these do not appear to have been sufficiently considered. Not only particular words or enactments,

but the whole scheme and tendency of these acts should be looked at. (He then commented on the several statutes, taking the same course of argument as before the Court below.) [ALDERSON, B., observed that stat. 9 G. 4, c. 17, s. 2, required the declaration to be made by every person who should be "*placed*, elected, or chosen" (not *admitted*) "in or to the office of mayor, alderman," &c.; and sect. 4 made such "*placing*, election, or choice," void, in case of omission.] It is contended for the Crown that the lord mayor and aldermen, in giving the admission, exercise only a ministerial function, are not authorized to put a question to the candidate, and must leave him to make the declaration at whatever time he pleases. But it was their right and duty to inquire whether he had signed the declaration. They were to see the law properly enforced; and the election was void if the declaration was not made within a month next before, or upon, the admission. Under the old law, according to *Rex v. Hawkins*, 10 East, 211, a candidate for the office of alderman might be asked even by an individual elector, at the time of election, whether he had taken the sacrament within a year. The word "upon" may be so used as to signify after; but it may also mean before or at the time; and it must receive a reasonable construction, according to the nature of the thing to be done, and the object for which it is required. Making the declaration after being admitted would be no test. If the candidate, on coming to be admitted, states that he has not made the declaration, and, on being asked then to make it, refuses, the election is void eo instanti; the statutes nowhere require the interval of a month before another person can be elected. (Nothing material was added, on this point, to the argument below.) Secondly, the true construction being that the declaration shall be made at the time of admission, it forms one of the acts in which the admission consists; and the Court before which that ceremony takes place must regulate its order. An attorney, on being admitted in this court, could not claim to determine whether he should take the attorney's oath or the oath of allegiance first. There is no hardship in requiring that the candidate shall be ready at once to say, whether he objects to the declaration; and it would be very inconvenient, where there were several persons, if all might reserve their answer on this point till the last moment of the Court's sitting. It may be contended that stat. 9 G. 4, c. 17, must be strictly construed, being penal. It is not, however, properly penal, for it is a relaxation of former penal acts; and the conditions of that relaxation ought not to be explained away.

Sir F. Pollock, contra. As to the last argument, although this act relaxes some provisions of the earlier statutes, it still imposes restraints which did not originally exist, and is so far against common law rights, and therefore to be construed strictly. The observation, that the judgment below will impliedly repeal stat. 9 G. 4, c. 17, supposes that an indemnity act will pass every year; but that is not to be assumed; and the statute must be construed according to its own language. This act substitutes certain provisions for those of the Corporation and Test Acts; but it does not follow that the enactments of those statutes furnish a rule for construing the acts substituted for them. The question is, whether, under the present act, the court of lord mayor and aldermen had a right to pronounce the election of Mr. Salomons void on his refusal, before admission, to say that he would make the declaration. A distinction was suggested from the Bench, during this argument,

between the words "placed" in sects. 2 and 4, and "admitted" in sect. 5. [ALDERSON, B. "Placed" probably means an appointment in any other mode than by election.] The words "placing, election, or choice," seem to have been adopted from 2 stat. 13 C. 2, c. 1, s. 12. "Placing" is opposed to "removing," in the preamble to that act, in a manner which seems to imply an admission. [ALDERSON, B. Sect. 13 of that statute enacts, "That every person who shall be *placed* in any corporation by virtue of this act, shall upon his *admission* take the oath or oaths usually taken by the members of such corporation." The statute probably used the general term "placing" as applicable to whoever might have the power to place in the particular office. Sect. 9 shows this; and, under the old corporation law, if a charter expired and a new corporation was constituted, the new officers would be *placed* by the Crown.] It is at least so far doubtful whether placing does not include admission, that no inference can safely be drawn, from the use of this word, in favour of the defendant's construction of stat. 9 G. 4, c. 17, ss. 2, 4. Then, further, the pleadings here do not show that the office had become void when the defendant was elected. It is nowhere said that Salomons refused to make the declaration. He omitted to do so at the court holden on December 3d; but, by the statute, he should have had a month for doing it, from the time of his election. At the court in question the functions of the lord mayor and aldermen, as to admitting, were ministerial only. [TINDAL, C. J. If they had actually admitted, it does not seem certain that the admission would have been void, as sect. 4 of stat. 9 G. 4, c. 17, avoids only the "placing, election, or choice."] Supposing, as is contended on the other side, that taking the declaration is part of the proceedings on admission, yet, in point of order, it ought to follow the act of admitting. "Upon," here means "after, within a reasonable time." By stat. 10 G. 4, c. 7, s. 14, Roman Catholics may hold office *upon* taking certain oaths: that clearly means *after*. The same construction prevails where a settlement is to be made *upon* marriage, or a penalty to accrue *upon* conviction, or *upon* default or refusal. [BOSANQUET, J. So, where a reward is to be paid *upon* conviction of an offender. ALDERSON, B. In most of the cases put, "upon" is used elliptically for "upon condition of." PARKE, B. Where a thing is to be done "*upon* payment of costs," it is so. TINDAL, C. J. There are instances where it refers to consideration. In the case of copyhold fines, "on admission" has been held to mean "after." It never means "before." The lord mayor and aldermen in this case should, at least, have expressed an intention to admit Mr. Salomons if he would make the declaration. As the case stands upon the pleadings, he calls on them to admit him; they, in answer, demand of him whether he has signed the declaration; he replies that he has not: they ask if he will do so; he declines to say whether he will or not, but requires them to admit: they refuse to do so, and thereupon declare the election void, and direct a precept for a new one. It is not necessary even to contend that they ought to have admitted him first, and then tendered the declaration: it is enough to say, that on his answering, "I will not tell you whether I will subscribe or not," the office was not void. This was not an omitting or neglecting to make the declaration, within stat. 9 G. 4, c. 17, s. 4. The question is, at what moment the office can be said to have become void? It did not upon Mr. Salomons's refusal to say whether he would make the declaration or not; for he might after

wards have offered to do it. [TINDAL, C. J. That would have altered the case very much; but it is not stated that he did.] He retained the right. The vacancy ought not to have been declared till another court was holden. [PARKE, B. Has the declaration of a vacancy any effect? If the office was void by law, was any judgment of the mayor and aldermen required?] At any rate, when he declined to say whether he would subscribe or not, they might, at his request, have adjourned, to give him time; and, if so, the office was not already void. But, even if it was void within sect. 4, it was not so to all intents, until legally called in question and determined. Sect. 9 shows that, for some purposes, the party might be an efficient officer. [ALDERSON, B., cited *The Margate Pier Company v. Hannam*, 3 B. & Ald. 266, (5 E. C. L. R.)(a).]

Sir *J. Campbell*, Attorney-General, in reply. The relator must establish that there could be no vacancy till a month had elapsed after the election, however positively the party elected might say that he never would make the declaration. Here, the conduct amounted to a refusal. [ALDERSON, B. The object contemplated in using the words "within one calendar month *next before or upon* his admission," was to allow the benefit of a declaration made before the admission, but yet to bring it as near as possible to the time of admitting, that it might not be suggested that the party had changed his mind in the interim. The words cannot have been intended to protect parties who hesitated whether they should take the declaration at all.] The word "placed" means, simply, "appointed without election," as in the case of a new charter, and in other instances, where the Crown nominates. Sect. 9 of stat. 9 G. 4, c. 17, gives validity to certain acts, but that is where they are done ignorantly; and the protection is for the benefit, not of the party exercising an office, but of those claiming under him. [PARKE, B. You say that when the party applies for admission, and omits to make the declaration, the office is void. Suppose he does not appear at the first or second court after his election; if he applies for admission at the third, has the office become void?] Not if he has never appeared; but if he comes, voluntarily or otherwise, and then does not make the declaration, it is void. Then as to the effect of the word "upon." [ALDERSON, B. The question must always be, whether the thing to be done, which follows that word, is made a condition or not.] That is so, whatever be the form of expression. Here, making the declaration is the condition of being admitted. [PARKE, B. You say that he never has more than one option of being admitted or not.] There is no reason that, when he appears, he should have more. As to declaring the avoidance, there is no need that the lord mayor and aldermen should do it; the law itself makes the adjudication. *Cur. adv. vult.*

TINDAL, C. J., in this term, June 4th, delivered the judgment of the Court.

In this case, the Court of Queen's Bench gave judgment in favour of the Crown upon a quo warranto information filed against the defendant, for exercising the office of alderman of the ward of Aldgate, in the city of London. The pleadings raise the question on demurrer, whether, at the time of issuing the precept by virtue of which the defendant below was elected alderman, the office was void, by reason of Mr.

a) Some of the arguments for the Crown, not materially differing from those used in the court below, are omitted.

Salomons, who had been elected alderman of that ward upon a vacancy by death, having neglected to comply with the provisions of stat. 9 G. 4, c. 17, s. 2.

Mr. Salomons had not made and subscribed the declaration, required by that act, before he tendered himself to the court of mayor and aldermen for admission into the office of alderman; and upon his so tendering himself, as it is averred in the plea, "the said David Salomons was then and there requested by the said court of mayor and aldermen to make and subscribe in their presence the said declaration in the said act mentioned," but "the said David Salomons did not, nor would, at the said court of mayor and aldermen so holden as last aforesaid, nor at any time within one calendar month next before or upon his admission" "into the said office of alderman," "or at any other time whatsoever, make and subscribe the said declaration, but wholly omitted and neglected so to do."

The replication does not traverse this omission and neglect, but states the special circumstances, viz. that, within the space of one month next after the day of his election, he presented himself to the court of mayor and aldermen, and demanded and made claim to be admitted; and that the Court demanded of him whether he had signed the declaration required by the said act within the space of one month next before his then application for admission; to which he answered, that he had not: whereupon the Court demanded of him whether he would make and subscribe the said declaration; whereupon the said David Salomons declined to say whether he would or not, but required the said Court to admit him to the said office, which the said Court, then and there, and within the space of one month from the election of the said David Salomons to the said office of alderman, positively refused to do; and the said Court then and there declared the election of the said David Salomons to the said office to be null and void.

Upon this state of the pleadings, the Court is bound to assume that he omitted to make and subscribe the declaration at the time when the Court required him to do so; because the allegation in the plea, that he did so omit and neglect, is not traversed, and it is expressly alleged in the replication that he would not say whether he would do so or not after he should be admitted; and the question therefore becomes this, whether, by reason of such omission and neglect, Mr. Salomons's election became void: which question depends upon the construction which must be put upon the act of parliament, as to the time at which the declaration required by the statute must be subscribed and made.

The statute 9 G. 4, c. 17, after referring, in the first section, to the acts usually called the Corporation and Test Acts, and reciting the expediency of repealing so much of them as imposes the necessity of taking the sacrament of the Lord's Supper according to the rites or usages of the Church of England, proceeds to repeal such parts of the said acts. The second section, after reciting that the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline, and government thereof, and the Protestant Presbyterian Church of Scotland, and the doctrine, discipline, and government thereof, are by the laws of this realm severally established, permanently and inviolably, and that it was just and fitting that, on the repeal of such parts of the said acts as impose the necessity of taking the sacrament as a qualification for office, a declaration, which is afterwards set forth, *should be substituted in lieu*

thereof, proceeds to order, "That every person who shall hereafter be placed, elected, or chosen in or to the office of mayor, alderman," &c., "or in or to any office of magistracy, or place, trust, or employment relating to the government of any city," &c., "within England and Wales or the town of Berwick-upon-Tweed, shall, *within one calendar month next before or upon his admission* into any of the aforesaid offices or trusts, make and subscribe the declaration" therein set forth.

The third section specifies in the presence of what persons the said declaration shall be made and subscribed; and the fourth enacts that "if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above-mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed."

It is clear, from these recitals and provisions, that the legislature meant to open as well corporate offices as places in the gift and appointment of the Crown to every person professing the Christian faith, instead of confining them, as before had been the case, to those only who were willing to take the sacramental test: but it is equally clear that it intended that no one should exercise such an office unless he made and subscribed, at the proper time, the declaration which is substituted instead of such sacramental test: and the only difficulty which is raised upon this record is, whether the proper time had arrived for holding the election of Mr. Salomons to be void, when he was required by the Court of mayor and aldermen to make and subscribe the declaration prescribed by the act, and when he omitted and neglected so to do.

And we are all of opinion that, upon the proper construction of the act, such time had then arrived, and that the non-compliance of Mr. Salomons with such requisition of the Court made his election to the office of alderman, *ipso facto* void.

Upon two points which have been made in the course of the argument, on the part of the Crown, we have entertained no doubt. We think it clear that the statute did not intend, by the second section, to give the period of one entire month to the person elected, within which he might decide whether he would make the declaration or not; and that the objection, that one month had not elapsed in this case between the election of Mr. Salomons and the application to be admitted, is entirely without foundation. The statute never could anticipate that any one would offer himself as a candidate for the office who had not already made up his mind to subscribe the declaration imposed by law; and the plain object of the provision contained in the second section appears to us to be that, if, at the time of being admitted, the person elected has already made the declaration so recently as within one month next before, (but not at an anterior period,) such making of the declaration shall be sufficient, and he cannot be called upon to make it again. Neither have we any doubt upon another point which was raised in the course of the argument, namely, that the legislature did not intend to give to the person elected a reasonable time *after* admission, for the purpose of making the declaration; for, in the first place, such are not the words of the act; nor could the legislature have ever contemplated that the propriety of making or not making the declaration was a subject which required any time for consideration. The words of the act, "upon his admission," do not,

as it appears to us, mean *after* the admission has taken place, but *upon the occasion of*, or *at the time of* his admission: the words of that section show the intention of the legislature to have been that the space of time commencing at the distance of one calendar month next before, and terminating with the act of admission, should be the limit or period within which the declaration was required to be made; so that, if not made at an earlier time, the latest opportunity of making it would be at the same time and place at which the oath of office was administered, and before the same persons. In effect, the making of the declaration does, by virtue of those words, form a part of the act of admission, and is an essential requisite to the being permitted to exercise the corporate office. And we hold it therefore to be unnecessary to refer to instances of the legal meaning of the word "upon," which, in different cases, may undoubtedly either mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation, with reference to the context, and the subject-matter of the enactment. And consequently, if, *immediately after* having been admitted in the same way as if this act had not been passed, Mr. Salomons had omitted and neglected to make the declaration, his election would unquestionably have been void, and it would have become the duty of the court of mayor and aldermen to have forthwith issued a precept for a new election.

But the point upon which the doubt, and the only doubt, in this case has arisen in our minds is, whether, upon the strict interpretation of the wording of the act, the election became void by the mere offer of the party elected to be admitted at the proper time when he ought to have been admitted, and by his omission or neglect at that time to make and subscribe the declaration required; or whether, as no admission had actually taken place in the old corporate form, that is, by taking the oath of office, the occasion had arisen upon which he was bound to make the declaration and the Court had the power to declare the election to be void.

It seems, however, to us, that the more reasonable construction of the act, and the construction which will best effectuate the intentions of the legislature, is, that, if the person elected (not having qualified within the preceding month by making the declaration) be not ready (and much more if he decline to say whether he will so do or not) to make and subscribe the declaration, as well as take the corporate oaths, at the time and place when his admission ought to take place according to the charter, by-law, law, or usage of the corporation, no complete or valid admission can take place at all; his admission could be at most but an idle form, since he cannot be permitted, under sect. 4, "to do any act in the execution of the office;" and that his election thereby becomes void. The declaration comes in lieu of the sacramental test; which, in the case of corporate offices, must have been taken, not only before the admission, but even the election of the party; it is a test of the required qualification for the office, both as indicating the religious faith of the party, and furnishing a security, by his solemn promise, against any injury to the Protestant church and its establishments. And, as the precise order in which each part of the act of admission is to take place is not defined by the statute, it is reasonable to hold, where there is any doubt as to which should precede the other, that the court of mayor and aldermen, being the proper court to give the admission, may prescribe the

order in which the respective parts of the admission shall be arranged; that they may first ascertain the qualification before they administer the oath of office, instead of adopting the course, which might be useless, and which, if useless, would be improper, and might even lead to inconvenience,—that of first administering the oath, and afterwards ascertaining the qualification. There is no reason, therefore, why the admission, by administering the corporate oath of office, should first take place before the statutory declaration is made, but the contrary, as thereby this great inconvenience would follow, that the time during which the corporation remains without an officer must be unnecessarily extended.

And we think this construction is entirely consistent with the words of the statute. The second section is formed upon the supposition that the party elected will be completely admitted, and requires that he make the declaration either within a given time before, or at the time and on the occasion of his admission, superadding a new requisite to the old corporate form of admission. It is the fourth section which provides for the consequences of an omission or neglect to make that declaration. It enacts that, if the person elected shall omit or neglect to make and subscribe the said declaration *in manner above mentioned*, such placing, election, or choice shall be void. The question, therefore, upon the words of this section, is, what is the proper meaning of the general words of reference, “in manner above mentioned?” And, coupling those words with the context, we think we are not bound to say that they mean at the time when a corporate admission has been actually completed; when it is clear from the context that an actual admission cannot be an available admission, unless the declaration is made, and that the person elected cannot, without such declaration made, exercise any corporate functions.

It is also not unworthy of observation that the words of the fourth section do not in terms provide that *the admission* shall be void, but *the election* only (for the word “placing” has no reference to admission, but only to appointment or title by any other mode than election or choice;) and it can scarcely be conceived that, if an actual admission had been contemplated, the legislature would not have declared such admission to be void, by the refusal or omission to make the declaration.

Upon the whole, therefore, we hold the meaning of the statute to be, that it makes void the election, if the person elected (not having previously qualified within a calendar month) should omit or neglect to qualify himself by making the declaration at the time and occasion when he ought to be admitted; and that the useless form of a corporate admission is not necessary before the party can be called on to qualify according to the statute, and before the election can by law be declared to be void.

We therefore think that the judgment of the Court of Queen’s Bench ought to be reversed.

Judgment reversed.

The QUEEN against The Lords Commissioners of Her Majesty's Treasury.

(In the Matter of TIBBITS.)—p. 374

A town clerk, who was in office at the passing of stat. 5 & 6 W. 4, c. 76, but who had been reappointed afterwards, and subsequently dismissed by the council, applied for compensation, which the council refused. He then appealed to the Lords of the Treasury by memorial, and prayed therein to be heard by himself, his counsel, agents, or witnesses. The council sent in a memorial in answer, and the town clerk another in reply. The council, in their memorial, alleged that they had dismissed him for conduct which, they stated, warranted removal. This the town clerk denied. The Lords of the Treasury, without hearing the parties further than by taking the memorials into consideration, awarded that the town clerk was entitled to no compensation; stating as their reason, that they thought the council had made the removal in the bona fide and justifiable exercise of the discretion vested in them. On application for a mandamus to the Lords, commanding them to hear the appeal, Held, that it could not be granted; for that, if the Lords had jurisdiction, (and semble, that they had not,) they had already heard and decided. Although the Court considered that the dismissal was not warranted by the town clerk's conduct.

CRESSWELL obtained a rule, in Michaelmas term, 1837, calling upon the Lords Commissioners of Her Majesty's Treasury to show cause why a mandamus should not issue, commanding them to hear and determine the merits of the appeal of James Tibbits, on his claim to be allowed compensation for the loss of the office of town clerk of the borough of Warwick: notice to be given to the solicitor for the Treasury, and the mayor and town clerk of the borough of Warwick.

The affidavit of Tibbits contained the following statements. On 7th May, 1827, he was appointed town clerk, (a) and he so continued until and at the passing of the Municipal Corporation Act, 5 & 6 W. 4, c. 76. Under the provisions of that act, he ceased to hold the office on 31st December, 1835. On 1st January, 1836, he was reappointed town clerk by the new town council. On 6th October, 1836, he was removed by them from the office. Shortly after the act passed, a minute was made and promulgated by the Lords of the Treasury, dated 10th September, 1835, and headed, "Compensation to Town Clerks," which referred to stat. 11 G. 4 & 1 W. 4, c. 58, and concluded as follows. (b)

(a) The affidavit also contained a statement of a claim for compensation made by Tibbits in respect of the offices of clerk of the peace and clerk to the justices, as to which the Lords of the Treasury awarded a gratuity; but as the argument and judgment related exclusively to the office of town clerk, so much only as relates to that office is stated in the text.

(b) The minute began thus. "My Lords read the 66th clause of the act for the reform of municipal corporations, by which compensation is provided for all corporate officers whose office shall be abolished, or who shall be removed from office under the provisions of the act, or who shall not be reappointed as aforesaid; and in certain cases an appeal is given to the Lords of the Treasury, who shall make such order as may appear to them just, which order shall be binding on all parties.

"Lord Melbourne and the Chancellor of the Exchequer inform the board that in the discussions which took place in parliament on this clause, it was stated by them that in fixing the amount of compensation it would be right and equitable to take into consideration, not only the salary and just emoluments of the office of town clerk, but also the profits derived from the performance of legal business of the several corporations executed by town clerks in their official capacity, and the just emoluments of any other corporate appointment held by such town clerk, and usually held in conjunction with, or attached or annexed to, the office of town clerk. My Lords concur in the views expressed by Lord Melbourne and the Chancellor of the Exchequer, and are pleased that their opinion should be recorded for the future guidance of the decisions on such cases as may be referred to them under the act.

"My Lords proceed to consider the principles upon which compensation should be

"My Lords consider that the principle adopted by the legislature in the fore-cited act may fairly be applied to the cases of the town clerks, and they are of opinion that in all cases where such officer holds his office for life, or where the usage has been such as to raise a just expectation that the office should continue for the life of the holder, a compensation of not less than two-thirds of his profits may be granted to such officer, estimated upon the principles stated in the commencement of this minute, and calculated upon an average of his just emoluments for the five years previously to the 1st January, 1835."

About 1st January, 1837, Tibbits delivered to the new town clerk and the treasurer of the borough a statement of his claim for compensation, in which he alleged that the appointment of town clerk had been always considered in the borough as an appointment for life, and gave an estimate of his annual emoluments on an average of the last five years, claiming in respect thereof 1200*l*. On 22d February, 1837, he received a notice from the then town clerk, stating that the council had wholly disallowed his claim, and enclosing a report of a committee appointed by them for considering it, wherein they stated "that the office of town clerk in Warwick was held during the pleasure of the recorder; and the committee do not find that the usage has been such as to raise a just expectation that Mr. James Tibbits should hold that office during his life: they therefore, on these grounds, (without referring to the various other objections to the claim,) do not consider that he is entitled to claim or receive any compensation out of the borough fund by reason of his removal from that office."

In March, 1837, he appealed to the Lords of the Treasury by a memorial, in which he stated the above facts, and mentioned that he had been removed by the council in consequence of some disputes having arisen between the council and himself relative to the transaction of the legal business of the corporation, which had been placed in the hands of another solicitor while he continued in the office of town clerk. He then submitted, in his memorial, that he ought to have been considered as holding for life, or, at all events, under such circumstances as to raise a just expectation that he should be continued in his office for life; and he set out a clause of the governing charter, (5 W. & M.,) by which it was provided that the town clerk should be appointed by the recorder, and continue in his office so long as it should please the recorder: and he referred to the usage of the borough, as showing a general practice of the town clerk holding for life. He added that he was willing to meet any charges of misconduct; and prayed that he might be heard before their Lordships by himself, his counsel, agents, or witnesses, in support of his claims, in case of further opposition thereto. About 14th July, 1837, he received from the Lords of the Treasury a copy of a memorial of the corporation in answer to his statement, with an intimation that it was sent to him in order that he might make any observation in reply. The memorial of the corporation stated that the usage had never been to consider the office as one for the life of the holder; and men-

awarded. My Lords read the act, 1 W. 4, c. 68, by which the legislature have secured compensation to officers in the courts of law upon abolition of office.

"My Lords read the fourth reason of the House of Commons for dissenting to the amendment of the Lords proposing to continue the existing town clerks for life, in which reason it is stated that a just and liberal construction cannot fail to be given to the compensation clause proposed by the House of Commons. My Lords consider," &c., (as above).

tioned that one Tibbits's predecessors had been dismissed from his office by a late recorder. Other facts were added as to the usage. The corporation further contended, in their memorial, that Tibbits had forfeited all claim to compensation, by reason of improper conduct towards the corporation, the facts respecting which they then stated; adding that they had therefore dismissed him from his office, and that they were ready to prove the truth of their statement in any manner which the Lords should think necessary. Tibbits transmitted a memorial to the Lords of the Treasury in answer, denying or explaining the allegations in the statement of the corporation, but admitting the fact of the dismissal of a previous town clerk by the recorder; and contending that (as he was legally advised) he was entitled to be employed in the legal business of the corporation.

About 28th December, 1837, he received a Treasury minute, dated 15th September, 1837, of which the following are extracts.

"The legal tenure of the office was during the pleasure of the recorder, who held his office for life. Mr. Tibbits contends that, though the tenure was nominally during the pleasure of the recorder, the usage was such as to raise a just expectation that he should hold the office for life. My Lords refer to Mr. Tibbits's own statement, in which they observe, that it is admitted by him that, in 1798, Mr. Thomas Greenway, the common clerk, was, in consequence of a dispute with the late Earl of Warwick,^(a) dismissed from his office. My Lords cannot admit that, with the recent instance before them, they should be justified in declaring that the immemorial usage had been such as to raise a just expectation that the office would continue for life, or during good behaviour. They do not, therefore, judge Mr. Tibbits entitled to the benefit of their minute of 1835, but are of opinion that he should be dealt with in the same manner as if he held an office during pleasure in the public service, and retired upon abolition or reduction of office, which course my Lords have pursued in similar cases."^(b) * * * * *

"It remains for my Lords to decide upon the claim for the loss of the office of town clerk, to which Mr. Tibbits was elected by the town council, from which he was removed on the allegation of misconduct. The object of the act, in giving the privilege of granting compensation in such cases, was clearly to prevent the claims for compensation being defeated under colour of a re-election and subsequent removal; but it was never the intention of the legislature to interfere with the just authority of the town council over their town clerk, or to deprive them of the fair claims which they possess to the zealous and faithful services of their legal adviser and agent. Had my Lords any reason to suppose, from the papers before them, that Mr. Tibbits was re-elected for the object of defeating his claim for compensation, and of removing him upon any pretext or excuse which might subsequently appear, and not with the bona fide intent of continuing him in office so long as he should conduct himself to the satisfaction of the town council, my Lords would have felt themselves bound to have awarded him the same compensation as if he had been originally removed from his office. Upon an attentive consideration of the papers, my Lords can find no ground to impute such a course to the town council, or to adjudge that the removal of

(a) The then recorder.

(b) It appeared from the minute that, in these cases, the Lords were in the habit of awarding a compensation as a gratuity, in proportion to length of service.

Mr. Tibbits was not made in the bona fide and justifiable exercise of the discretion vested in them. In this view of the case, my Lords are decidedly of opinion that Mr. Tibbits is not entitled to compensation for his removal from the office of town clerk." Their Lordships then ordered that no such compensation should be awarded.

Tibbits further stated, in his affidavit, that his prayer to be heard before the Lords had not been complied with, and that, as far as he was informed, their decision was made without any further investigation than as appears by the documents above mentioned. In last Hilary term,^(a)

Sir *J. Campbell*, Attorney-General, Sir *F. Pollock*, and *Wightman*, showed cause on behalf of the Lords of the Treasury, and Sir *W. W. Follett* and *Waddington* on behalf of the corporation.^(b) The Lords of the Treasury have in fact heard this application, and would so return, if the mandamus were to go. Whether they decided correctly or not, is a question which cannot now be discussed; this Court will not hear an appeal from the decision, even upon a pure question of law: *In the Matter of Pratt*, 7 A. & E. 27, (34 E. C. L. R.) In *Rex v. The Mayor, &c., of Bridgewater*, 6 A. & E. 339, (33 E. C. L. R.), this Court interfered; but there they enforced a decision of the Lords of the Treasury. The Court there seemed to consider that the decision of the Lords, if without jurisdiction, might be a mere nullity, and so not to be enforced by this Court: and in *Regina v. The Corporation of Poole*, 7 A. E. 730, the Court refused to enforce their decision, conceiving the case not to be within the statute, and that the Lords, therefore, had no jurisdiction. Here, the assumption on the other side is that they have no jurisdiction; otherwise the mandamus could not go. Besides, under the circumstances, the compensation could be merely nominal: the Court therefore will not grant the writ; *Ex parte Lee*, 7 A. & E. 139, (34 E. C. L. R.)

Cresswell and *G. Hayes*, contra. It is certainly true that this Court will not enforce an order of the Lords of the Treasury where the statute gives no jurisdiction, because the Lords cannot give themselves jurisdiction. It seems to follow that they cannot divest themselves of jurisdiction: and therefore this Court, when the Lords refuse to hear a case within the statute, will compel the hearing: *Rex v. The Justices of Kent*, 14 East, 395, *Rex v. The Justices of the City of York*, 1 A. & E. 828, (28 E. C. L. R.) show the power exercised by this Court in such cases. In this case there has been no hearing. It is not necessary to contend that the applicant had a right to appear by counsel or agent: but, after the respective statements were before the Lords of the Treasury, the parties should have been heard; and a decision given without such hearing is a nullity. Mr. Tibbits applied, in his first memorial, to be heard by himself, or his counsel or agent. This was the more necessary, because from *Ex parte Lee*, 7 A. & E. 139,^(c) it appears that the Lords of the Treasury are not aware that an office held during good behaviour is an office for life. Here they appear to assume that a bona fide removal is sufficient to destroy a claim for compensation; but the legislature meant to provide, not merely against removals mala fide, but against removals, generally, which might be made under circumstances not justifying dismissal from an office held

(a) January 12th, 1839. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Jr.

(b) *Cresswell* objected to counsel being heard on behalf of the corporation, although the rule directed notice to be given to them; but Lord Denman, C. J., said that, according to the practice in such a case, the corporation were entitled to be heard.

(c) See p. 141.

during good behaviour. Such removal, though made bona fide, may be unjustifiable. The proviso in sect. 66 of stat. 5 & 6 W. 4, c. 76, is, "That every such officer who shall be continued in or re-appointed to such office under the provisions of this act, and who shall be subsequently removed from such office for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this act, and had not been continued in or re-appointed to such office." This refusal appears, by the statement of the Lords of the Treasury, to have proceeded on a wrong principle. *Cur. adv. vult.*

Lord DENMAN, C. J., in the present term, (June 3d,) delivered the judgment of the Court.

This was an application for a mandamus to hear and decide the appeal of the late town clerk of the borough of Warwick against the refusal of the council to allow him any compensation for the loss of his office. It arises under the sixty-sixth section of the Municipal Reform Act, which requires the town council to make compensation to all whose offices may be abolished, or who may be removed from them under the provisions of that act, with a proviso, that every such officer who shall be so removed for any cause, other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been removed forthwith under the provisions of that act, and had not been continued in or reappointed to his office.

The facts of the present case are these: that the town clerk was continued in his office for some time after the act passed; but the corporation, being involved in some proceedings in chancery respecting the management of a charity, were dissatisfied with his conduct in some particulars connected with it. He had refused to part with some documents, placed by the terms of the trust under his care, for the purpose of being carried to the solicitor in London; and had insisted on keeping the key of the chest in which they were lodged. These circumstances produced some degree of inconvenience, and some angry feelings; and he was removed from his office by a vote of the council, who refused him all compensation. On his appealing to the Treasury, their Lordships were of opinion that the removal was justifiable, and confirmed the order of the council, observing to the effect that, though officers were not to be removed without reasonable cause, yet in this case they thought the council had just ground for dissatisfaction in the town clerk's conduct, and were therefore not bound to make compensation to him on his removal.

In the Treasury minute issued on the present occasion, their Lordships very candidly disclose the reasons for their decision, observing that the proviso was meant to protect the officers from fraudulent amotion, but that the town council of Warwick could not be charged with any improper motive, as the dissatisfaction appears to their Lordships to be genuine and well founded. But, in answer to this, it must be said that the protection against fraudulent amotion is specific, and is referred to a precise test,—whether the amotion would have been warranted by the officer's misconduct.

The town clerk urges that he has been guilty of no such misconduct. We think him in this clearly right; and the contrary proposition was

not contended for at the bar. But the cause shown against the rule was, that the proceeding asked for was already complete, as the Lords of the Treasury had heard and decided the complaint; which is certainly true: so that, if they have jurisdiction over the subject-matter, as the application for the rule supposes, they have actually pronounced a judgment which cannot be questioned.

The Court, however, conceived a strong doubt whether this jurisdiction is intrusted by the act to the Lords of the Treasury. An appeal to them is indeed given from the decision of the town council; but the proviso comes after, giving full compensation to such as may be removed without such misconduct as would warrant dismissal, not such as their Lordships may think would have warranted dismissal. No power is conferred by the act on the Lords of the Treasury, for ascertaining the facts which may be thought to prove such misconduct; nor is there any disrespect to their Lordships in supposing that they may not be cognisant of the law (often difficult of application) on which the question might turn.

These considerations appear to prove that the Lords of the Treasury have no power to decide the question whether the town clerk has or has not been properly removed from his office. If they have it not, the mandamus prayed for cannot issue, for that reason. If they possess the jurisdiction, the answer, that they have already exercised it, is equally conclusive against making the rule absolute.

Whether there may be another remedy it is no part of our duty to decide at present.

Rule discharged.(a)

(a) The QUEEN v. The Lords Commissioners of Her Majesty's Treasury.

(In the Matter of TREVOR).—p. 385.

A rule for a similar mandamus had been obtained in Michaelmas term, 1837, by Sir W. W. Follett, on behalf of John Trevor, late town clerk of Bridgewater. In last Easter term, (April 16th, before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.,) Sir John Campbell, Attorney-General, Sir F. Pollock, and Wightman showed cause, and Jervis and Jardine supported the rule. The following cases were referred to: *Harcourt v. Fox*, 4 Mod. 167; *Rex v. Owen*, 4 Mod. 298; *Bagg's Case*, 11 Rep. 98 b.; *Rex v. The Mayor and Aldermen of London*, 3 B. & Ad. 255, (21 E. C. L. R.); *Ex parte Smyth*, 3 A. & E. 719, (30 E. C. L. R.); *Kent v. Elstob*, 3 East, 13.

Cur. adv. vult.

Lord DENMAN, C. J., after delivering the judgment in the text, added,—In another case, moved on the part of the town clerk of Bridgewater, the same judgment must be given; the only difference in the two cases lying in the particulars of conduct which have been thought to justify his dismissal, but, in our opinion, certainly do not, within the terms and meaning of the proviso.

Rule discharged.

See the next cases, p. 386.

The following cases may properly be added here.

The QUEEN against The Corporation of Warwick.

The QUEEN against The Mayor, Aldermen, and Burgesses of the Borough of NEWBURY.—p. 386.

Where a party removed from a borough office under stat. 5 & 6 W. 4, c. 76, reappointed, and afterwards dismissed, applies to the town council for compensation, which is refused, and he thereupon appeals to the Lords of the Treasury under sect. 66 of the statute, the Lords have no jurisdiction to inquire whether he was or was not removed for a sufficient cause within that section.

And therefore, where the council had refused compensation, and the Lords, on appeal under sect. 66, and on inquiry into the facts leading to the dismissal, confirmed such refusal, this Court, on affidavits satisfactory to them, granted a mandamus calling on the corporation to assess compensation, notwithstanding the judgment of the Lords.

AFTER the above decision in *The Queen v. The Lords of the Treasury*, a rule was obtained on behalf of Mr. Tibbits, in the same (Trinity) term, for a mandamus to the corporation to assess compensation to him for the loss of his office of town clerk. The affidavit in support of this rule set forth the same grounds of application as those urged in support of the former motion; alleged reasons for which Mr. Tibbits believed that he should have held his office till death or resignation, but for the passing of stat. 5 & 6 W. 4, c. 76; and mentioned the prior application against the Lords of the Treasury, and its unsuccessful result, stating, as the ground of rejection, "that this deponent was not legally entitled to any compensation under the said statute." The affidavits in answer went into the merits of the case as to the grounds of dismissal, and the alleged tenure of office, and stated that the Lords, on a full statement of facts, had decided against Mr. Tibbits as to the tenure and reasonable expectation of continuance in the office.

In the case of *The Queen v. The Mayor, &c., of the Borough of Newbury*, a rule had been obtained, on behalf of Robert Baker, (in Trinity term, 1839,) for a mandamus commanding the mayor, &c., to prepare, execute, and deliver to him a bond, securing to him an annuity of 107*l.*, in compensation for the loss of his office of town clerk of the said borough. He stated in his affidavit that he was town clerk when stat. 5 & 6 W. 4, c. 76, passed, was reappointed in August, 1836, and was dismissed, by resolution of the town council, in January, 1838. He denied that such dismissal was merited, or that he had been guilty of such misconduct as would warrant his removal from the said office or any office held during good behaviour; and he stated his belief (alleging circumstances as to the tenure in former times) that, but for the passing of the act, he would have continued to hold the office during life. He then deposed that, in March, 1838, he laid before the town council a claim of compensation, which they disallowed; whereupon he presented a memorial of appeal to the Lords of the Treasury, setting forth the material circumstances of the case. The Lords transmitted the memorial to the mayor, to be laid before the town council for any observation upon or answer to it which they might think fit to submit; and the town council presented a reply to the memorial, in which they stated at length the reasons for their determination on Mr. Baker's claim, and contended that he was not entitled to compensation under the sixty-

sixth section of the act. The Lords transmitted this statement to Mr. Baker for any observations which he might think fit to make; and he presented a memorial in answer. The Lords, by minute of January 23d, 1839, made (as was therein stated) after having "read all the papers in the appeal," and "upon a full consideration of all the papers," pronounced Mr. Baker entitled to compensation; awarded him an annuity of 107*l.* for life; and directed that an order should be prepared, and sent, with that minute, to the mayor. The affidavit stated that this was done, but no step taken by the town council for granting the annuity.

The affidavits in answer controverted Mr. Baker's statements as to the tenure of the office, and alleged further that he had been dismissed (after due examination and hearing) for misconduct, which they shortly specified, and which, in the opinion of the town council, would warrant removal from any office held during good behaviour: and that the facts in these affidavits above mentioned, and all the material circumstances of the dismissal, were stated by the town council to the Lords of the Treasury, in answer to Mr. Baker's memorial, and while the same was under their consideration. The affidavits then set forth more fully the circumstances of the alleged misconduct, and of Mr. Baker's dismissal, and averred that the town council delivered to the Lords a statement under their common seal, alleging the principal facts above set forth, and examining the details of Mr. Baker's claim for compensation; but such examination was declared to be without prejudice to the position that his conduct warranted his removal without compensation. The deponents also stated that they were advised and believed that the misconduct stated by them warranted removal from any office held during good behaviour.

This case coming on for argument before that of *The Queen v. The Corporation of Warwick*, and raising the same point as to the jurisdiction of the Lords of the Treasury, the Court desired to hear the latter case also before giving any judgment; and they were argued in immediate succession. (a)

Sir *W. W. Follett* and *J. L. Adolphus* against the rule in *The Queen v. The Mayor, &c., of Newbury*. The adjudication of the Lords of the Treasury is ineffectual for want of jurisdiction. By stat. 5 & 6 W. 4, c. 76, s. 66, every officer of a borough "who shall be in any office of profit at the time of the passing of this act, whose office shall be abolished, or who shall be removed" under the act, or shall not be re-appointed, and every such officer re-appointed under this act who shall be subsequently removed "for any cause other than such misconduct as would warrant removal from any office held during good behaviour," is declared entitled to compensation, which is to be assessed by the council and paid out of the borough fund.

The same section enacts that every person "entitled to such compensation" shall deliver a statement as to his past emoluments, &c., and setting forth the sum claimed by him, which statement shall be taken into consideration and determined upon by the council; and, if the claimant "shall think himself aggrieved by the determination of the council thereon, or in case one third of the members of the council shall subscribe a protest against the amount of compensation allowed by the determination of the council as excessive," the claimant, or any member of the council so subscribing, may appeal to the Lords of the Treasury,

(a) January 29th and 30th, before Lord Denman, C. J., Littledale, Williams, and Coleridge, J.

“who shall thereupon make such order as to them shall seem just;” and such order, signed, &c., “shall be binding on all parties.” By this clause it is an essential preliminary to the claim, that the party shall have held office under the circumstances pointed out by the act, and have been removed (or not reappointed,) under the act; or that, if reappointed, he shall have been removed for such cause as the section defines. These are facts necessary to give the claimant a locus standi before the council. If they are unquestioned, and the council adjudicate upon the claim, but make an unsatisfactory award as to the amount, an appeal clearly lies to the Lords of the Treasury. But, if these preliminary facts, or the legal inference from them, as he suggests it, be denied, and the council for that reason refuse to award any compensation, the claimant ought not to appeal to the Lords of the Treasury, nor can they inquire into the matter in dispute. He must move this court for a mandamus to the council to hear his claim and award compensation; if they still contest the facts upon which he grounds his right of claim, the Court, if it sees cause, will grant the writ, and, on a return, the facts may be tried in due course of law. Then, if a peremptory mandamus issue, the council must determine the amount of compensation; and upon that point the claimant, if dissatisfied, may appeal to the Lords of the Treasury. But, if, when the council refuse to entertain his claim, he appeals, in the first instance, to the Lords upon the disputed question of fact or law, he submits matter to them which they have no power to try. The Lord Treasurer, whom they represent, had no such judicial authority; 4 Inst. c. 11; and they can have none but that which the statute gives them. The statute furnishes them with no means of inquiring into disputed facts; they cannot administer an oath, or compel the attendance of witnesses: and on points of law they have no legal assessor; nor is there any court of appeal to rectify their judgments if they mistake the law: yet, if they could determine the preliminary questions which arise as to the right of making a claim, they would often have to decide very important questions both of law and of fact. The statute, in reality, makes them mere valuers. When the party “entitled to such compensation” has had his statement received and considered by the council, the Lords of the Treasury are, in case of appeal, made arbitrators upon the question of amount. Their mode of trying, by memorials and counter-memorials, is suited to this kind of investigation, but not to inquiries of a more difficult kind, as on questions of misconduct. The appeal is given in case the claimant thinks himself aggrieved by the determination, or if one third of the council protest against the amount of compensation as excessive. There is no reason that the inquiry should be limited to amount in one case more than in the other; the wording of this clause is an additional proof that the same limit was contemplated in both instances. It may be contended that the council are, by sect. 66, to assess compensation with “regard” to “all” the “circumstances of the case,” and that the Lords must assess upon the same principle: but the “circumstances” on the inquiry before them, can only be those bearing on the question of amount. Here the Lords have made their award upon statements raising the whole question of misfeasance in office; their adjudication, therefore, is grounded on an excess of jurisdiction.

In the late case of *Regina v. The Lords of the Treasury, In the Matter of Tibbits*, ante, p. 374, this Court expressed at least a doubt as

to the jurisdiction of the Lords to decide whether or not a town clerk had been properly removed. In *Rex v. The Mayor, &c., of Bridgewater*, 6 A. & E. 339, (33 E. C. L. R.,) where the Lords, on appeal, had awarded compensation, as for a corporation office, Lord DENMAN, C. J., and COLERIDGE, J., intimated that, if it had appeared not to be a borough office, the Court would not have enforced the decision, and that the Lords could not, by their own order, give themselves jurisdiction. If they had jurisdiction, their order, by sect. 66, was "binding on all parties." In *Regina v. The Corporation of Poole*, 7 A. & E. 730, (34 E. C. L. R.,) the Lords had, on appeal, awarded compensation for dismissal from an office: but this Court held that the party was not dismissed by virtue of the Municipal Corporation act, and therefore refused to enforce the award by mandamus: and Lord DENMAN, C. J., said, "We were desirous of considering whether, upon the affidavits, he was an officer of the borough of Poole, and had been removed from his office under the provisions of the act. If we should be satisfied that the affirmative of both these propositions was established, we had no doubt that the Lords of the Treasury had the exclusive jurisdiction to determine on his right to compensation; and it would then be our duty to enforce by mandamus obedience to the award they have made; but, if either of those propositions be decided in the negative, it would be equally clear that their Lordships have not, and of course cannot give themselves, jurisdiction." It is unnecessary here to discuss the facts; for it is sufficient that the council have dismissed Mr. Baker's claim on account of an objection to his right of appearing as a claimant; namely, that he was removed from office on a bona fide charge of misconduct. Had the charge been made colourably, to preclude the claim, a different question would have arisen; but that is not pretended.

Sir *J. Campbell*, Attorney-General, and *Whateley*, in support of the rule; and Sir *J. Campbell*, Attorney-General, and *Waddington*, in opposition to the rule in *The Queen v. The Corporation of Warwick*. If the Lords of the Treasury had not jurisdiction, their award, of course, cannot stand. But it is clear that they have jurisdiction over the claim of an officer dismissed and not reappointed; and there is no distinction between that and the claim of a person reappointed and dismissed without proper cause. It is contended on the other side that, on appeal, the act makes them merely valuers; but sect. 66 directs that the town council, in assessing compensation to an officer not reappointed, is to consider "the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case;" and, when the claimant appeals, the whole matter, as it came before the council, is, by sect. 66, referred to the Lords of the Treasury. Where members of the council protest, the Lords are expressly limited in their inquiry to the question of amount; but, where the claimant appeals, there is no such restriction; the council are first to decide upon the right of claim and the quantum; and, "in case the person preferring such claim shall think himself aggrieved by the determination of the council thereon," he may appeal to the Lords of the Treasury, "who shall thereupon make such order as to them shall seem just." It is contended that the Lords of the Treasury cannot decide a disputed question on the right, because they have no authority to administer an oath: but they can decide upon the evidence taken before the council. Here the town council of

Newbury submitted themselves to the judgment of the Lords upon the evidence. If, indeed, the supposed office for which the Lords grant compensation prove not to be an office within the act, their award must necessarily be a nullity; and that was the case in *Regina v. The Corporation of Poole*: but no such point arises here. In *Ex parte Lee*, 7 A. & E. 139, (34 E. C. L. R.), it was made a question whether the Lords had jurisdiction where the council had entirely refused to grant compensation under all the circumstances of the case; and this Court did not deny that they had such jurisdiction. But in such a case, if the Lords could decide at all, the whole matter must go before them. This Court will not enter into questions of nicety on the jurisdiction of the Lords Commissioners in cases of compensation. They are appointed by the statute as a temporary tribunal to administer rough justice (under the control of this Court) in a particular class of cases, the legislature placing this confidence in them with a view that they should act liberally, and take care that persons really aggrieved should obtain the compensation due to them.

Cresswell and *G. Hayes* in support of the rule in *The Queen v. The Corporation of Warwick. Ex parte Lee*, if it decided anything applicable to the present case, would show that the town council cannot absolutely refuse compensation, nor the Lords of the Treasury confirm such refusal on appeal. *Regina v. The Corporation of Poole* is, in principle, decisive of this case. If the Lords of the Treasury there could not decide conclusively that the claimant was removed from his office under circumstances entitling him to compensation within the statute, neither can they conclusively decide that point here. This Court is, by virtue of its ordinary jurisdiction, the proper tribunal for determining the party's right to be a claimant; and that jurisdiction could be taken away only by express statutory enactment. It is argued that, although the Lords cannot examine witnesses, they may act upon the evidence taken by the town council; but, where an individual is the appellant, he might justly complain that this was trying the case on evidence taken by the adverse party. And the council have no power, by sect. 66, to examine any one on oath but the claimant himself.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court in *The Queen v. The Corporation of Warwick*.

The late town clerk, having been removed from his office, appealed to the Lords of the Treasury, complaining that the removal was not justified by such misconduct as would have warranted his removal from an office held during good behaviour. Their Lordships, having considered the statements of both parties, dismissed the appeal, thinking that the council had acted bona fide, and that they had just ground for removing the officer. The supposed misconduct was laid before us by affidavit, and appeared to us then, as it does now, not to be such as would have warranted removal from an office held during good behaviour. If, however, the Lords of the Treasury had jurisdiction to try that question, all the world is bound by their decision, though we may deem it erroneous. But a mandamus to them to hear and decide was refused, because they either had no jurisdiction or had already exercised it. The same gentleman has now obtained a rule for a mandamus to the council to assess compensation for the loss of his office, on the ground that his

removal was unwarrantable under the proviso above alluded to. The cause now shown against that rule is the before-mentioned decision of the Lords of the Treasury on his appeal, and brings directly before us the question of their jurisdiction in this matter.

The effective words of the sixty-sixth clause are, that every officer of a borough who shall be in any office of profit at the time of the passing of this act, who shall be removed from his office under the provisions of this act, shall be entitled to have an adequate compensation, to be assessed by the council, for the salary, fees, and emoluments of the office, regard being had to the manner of his appointment, and his term or interest in the office, and all other circumstances of the case: the person entitled shall deliver in a statement of the amount received by him for the last five years, and the council shall consider and determine thereon; and, if he think himself aggrieved by their determination, it shall be lawful for him to appeal to the Lords of the Treasury, who shall thereupon make such order as to them shall seem just, which shall be conclusive and binding: Provided (among other things) that every such officer who shall be continued in office and subsequently removed "for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this act," and not continued or reappointed.

If, now, this town clerk had been forthwith removed, he would have been entitled to an adequate compensation for the emoluments of his office, regard being had to the nature of his appointment, his term in the office, and all other circumstances of the case, with a power of appealing, if dissatisfied with the determination of the council, to the Lords of the Treasury.

Must they, the Lords, then, have the right to consider the causes of removal, and decide on their sufficiency? If so, it must be from being empowered to look at them as circumstances of the case; but the circumstances are only referred to them as qualifying the amount of compensation, while, if the removal were justifiable, no compensation could be due. Or must not the facts be such as to show that the removal was not for misconduct, to ground their jurisdiction? We think the latter. The words of the proviso control the whole clause; if the council removed without a case of misconduct, they must give compensation. Whether that misconduct existed, must be determined by some superior authority. But, if that authority was the Treasury, it is incredible that no power is given to their Lordships to inquire into the facts; nor can they be expected to possess the legal knowledge requisite for deciding what misconduct would have justified the officer's removal. On the contrary, all the words of the section are employed in creating a power to revise the assessment of the compensation, in like manner as if the party had been removed by the Municipal Reform Act, or immediately after its passing.

We think the town council could not deprive their officer of his right to compensation by removing him without cause; that the Lords of the Treasury had no authority to exclude him from compensation by their affirmation of what was done; and that he is entitled in the same manner as he would have been if removed by the act itself.

The rule for a mandamus must, therefore, be absolute; or, if the

council think their dismissal justified by the misconduct of the town clerk, that must be returned as an answer to the writ.

Rule absolute.

In *The Queen v. The Mayor, &c., of Newbury*, The Court, in Easter term, (May 2d,) 1840, desired to have the facts returned, and made the rule absolute.

The QUEEN against CAPEL HANBURY LEIGH, Esquire,
and Others.—p. 398.

A land-owner may be liable, by prescription, to repair sea-walls, though destroyed by extraordinary tempest. And, therefore, on presentment against such owner, for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist ordinary weather and tides: but it is a question, to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also.

Orders of the commissioners of sewers, requiring land owners to repair and alter sea-walls, may be given in evidence as adjudications by a court of competent jurisdiction, without proof of their having been acted upon. After a considerable lapse of time, (as seventy years,) the Court will presume that such orders were executed.

PRESENTMENT at a general court and sessions of sewers for the levels of the hundreds of Caldicot and Wentlooge, in Monmouthshire. The presentment charged that the defendants, and all those whose estates they have of and in certain lands and tenements commonly called the Lordship of Porton, situated within the parish of Goldcliff, in the county of Monmouth, within the level of the hundred of Caldicot, and within the jurisdiction of this court, (part of which said lands abut in part upon part of the wall hereinafter mentioned,) from time whereof, &c., by reason of their tenure of the said lands, &c., have been forced to repair, and of right ought to have repaired, and still of right ought, &c., divers parts of a certain wall called Portion Wall, adjoining to a certain public navigable river called the Severn, and within the said parish, &c., and within the level and jurisdiction aforesaid, that is to say, a certain part of the said wall, &c., (stating the extent and local situation of the portions of wall,) which said several parts of the said wall are within the parish, &c., and within the level and jurisdiction aforesaid. Averment that, although defendants ought to have repaired and kept in repair the said several parts, they have wholly neglected so to do, and that, by and through the neglect and default of defendants in this behalf, and for want of the said several parts of the said wall being kept in due and sufficient repair, heretofore, to wit, on, &c., divers large portions of the said wall, viz. (stating the length of the portions respectively,) were ruinous, prostrate, &c., and yet remain and continue ruinous, prostrate, &c., down to the time of taking and finding this inquisition. And that defendants, by reason of their tenure of the said lands and premises, ought to repair, amend, and make good the said several breaches, defects, and injuries in the said several parts of the said wall. And the jurors further presented that the costs of repairing the said breaches, &c., would amount to 767*l*. The presentment was removed by certiorari into this Court, where the defendants pleaded Not Guilty.

On the trial of the issue, before BOLLAND, B., at the Monmouthshire Spring assizes, 1837, it appeared that the defendants were liable to repair *ratione tenuræ*, and that the wall had been thrown down by the

sea on October 11th, 1836. The defendants insisted that in this instance they were not liable, inasmuch as the mischief had been done by an extraordinary tempest, which fact was proved. It appeared that the wall in question had been repaired by the lords of the land now charged, in 1813 and 1815, after storms: the last time at an expense of more than 5000*l*. Some evidence was given as to the condition of the wall before the repairs done in 1813 and 1815 became necessary. There was no proof that before these times it had been presented as wanting repair.

The counsel for the crown also tendered in evidence certain documents alleged to be presentments by sewers' juries touching defects and liabilities to repair within the levels in question; and minutes of orders purporting to be made by the commissioners of sewers within these levels at various periods during the last hundred years, (among others, an order of 1761,) for the repair or alteration of walls by parties mentioned in the minutes as liable. The presentments and orders were contained in books, produced by the clerk of the commissioners, who held them in that capacity. BOLLAND, B., held the presentments inadmissible. As to the orders, he inquired if they had ever been acted upon. Maule, for the crown, said that, in the case of old orders, that could not have been shown, but that the orders themselves were acts and that it lay on those who disputed their admissibility to show that they had been disobeyed. BOLLAND, B., held that the orders, no appearing to have been acted upon, or even to have come to the knowledge of the parties supposed to be affected by them, could not be read.

The learned judge, in summing up, told the jury that the only question was, whether or not the wall, which the defendants were charged as liable to repair, was, at the time of the storm on October 11th 1836, in such a state as to have resisted the ordinary pressure of the weather and tides upon the spot on which it was constructed; and he said that, if the prostration of the wall was attributable to the storm, and not to any infirmity in the wall itself upon which the defendants would be liable, it would of course be the duty of the jury to acquit. His lordship read to them the argument of Gibbs and Dampier in *Rex v. The Commissioners of Sewers for the Western Division of Somerset*, 8 T. R. 312, which he said was recognised as law by Lord KENYON in the same case; and the judgment of ABBOTT, C. J., in *Rex v. The Commissioners of Sewers for Essex*, 1 B. & C. 477. And he again stated the only question to be, whether the wall fell by reason of any infirmity in it which the defendants were liable for as being an act of their own and an act of nuisance, or by reason of the extraordinary tempest on October 11th. The jury found the defendants Not Guilty.

Maule, in the ensuing term, moved for a rule to show cause why the verdict should not be set aside, and a new trial had, on the following grounds. First, the learned judge was wrong in leaving it to the jury to say whether the wall at the time of the storm was fit to withstand ordinary bad weather, and intimating to them that a party liable by tenure is not bound to repair in case of extraordinary tempest. Obligation by tenure is in this respect like obligation by covenant. The doctrine sanctioned by the learned judge derives some colour from the language of WALMESLEY, J., in *Rooke's Case*, 5 Rep. 99 b; but in *Keighley's Case*, 10 Rep. 139 a, WALMESLEY, J., "explained his opinion in *Rooke's Case*, that the commissioners ought not to charge him who is bound by prescription only: that he meant where there is no

default in him, (for that agrees with the words of the said act of 23 H. 8.) and no inevitable necessity for insufficiency or otherwise; but if he himself can do it, there he himself shall be only charged by force of the said commission: and he said, that his reason given in *Rooke's Case* implied as much, *sc.* for otherwise it may be that all the country will be drowned; which reason imports his meaning, that all who had lands in danger should not be charged, but in case of insufficiency of him who is bound, or for other inevitable necessity." And Callis, in his reading on The Statute of Sewers, p. 144, thus comments on the cases. "In *Rooke's Case* it is said, 'that if one be bound in respect of his lands to repair a wall or bank by tenure, prescription, or otherwise that yet the commissioners of sewers could not assess the said party alone to repair the same, and said that the commissioners were not tied to the rules of prescription, tenure, custom, or otherwise, but ought to assess all the level to do the same, which are to have good thereby: but this being mistaken, is very justly and discreetly altered in the said *Case of Keighley* by the author himself; for how could it be presumed that the learned makers of this worthy law would have stricken down at one blow so many thousand prescriptions, customs, tenures, covenants, and uses, as be within this realm, which be tied and bound to do and make the repairs in this kind, some in consideration of houses and land, others for yearly rents, and for other causes." And at p. 146 he cites a case from Dyer, (a) "where one made a lease for years of grounds to J. S., lying near the river Exe, and the lessee covenanted to sustain and repair the banks of the river to preserve the meadow from surrounder on pain of 10*l.*; yet, after an extraordinary flood, the banks were broken down, and the meadows were surrounded, and it was there holden to be no breach of covenant." In the edition of 1685 there is added this note, (which subsequent editions retain:) "And that he should be excused from the penalty:" with, indeed, a qualification,— "but yet he must make and repair the banks in convenient time." In *Rex v. The Commissioners for Sewers of Somerset*, 9 East, 109, where the sea-wall had been thrown down by a violent storm, the commissioners made an order, charging all persons who held lands liable to damage by inundations of the sea for want of a sufficient wall, though certain individuals had been liable to repair the former wall *ratione tenuræ*; and it may be said that the validity of the order, as to the persons charged, was not disputed. But there the order was for building "a new wall of larger size and dimensions, and upon a different principle." The thing to be done, therefore, was not that which the individuals were bound by prescription to do. In *Rex v. The Commissioners of Sewers for the Western Division of Somerset*, 8 T. R. 312, it was argued and admitted that, if sea-walls be destroyed by an extraordinary tide, or by tempest, without any default in the party bound to repair them, the expense of repair must fall upon the level. But the point decided was that, in such a case, a rate necessarily imposed upon the level to prevent the overflow of the sea was not bad. And there it had become "absolutely necessary to raise new works of a different and more expensive construction." [PATTESON, J. According to your view, there could be no case in which there was not default in the party liable, if the wall were prostrate.] If it was destroyed by an extraordinary tempest, he would, nevertheless, be bound to repair;

(a) Anonymous, Dyer, 33 a, pl. 10.

but, on a presentment against him, he might show, upon the plea of not guilty, that before the accident he had kept up a wall of proper dimensions, and that he had taken steps for repairing it as soon as possible afterwards. There is no authority showing that, where a party is liable without qualification to repair *ratione tenuræ*, he can be excused on the ground here suggested. [Lord DENMAN, C. J., mentioned *Rex v. The Commissioners of Sewers for Essex*, 1 B. & C. 477.] Secondly, the orders of the Court of Sewers calling on the lords of Porton, the defendants' predecessors, to repair, (and no orders on any one else were tendered in evidence,) ought not to have been rejected. It was urged that they were not admissible, because nothing appeared to have been done upon them; but, if they were obeyed, no evidence of that fact would appear, though, if they had been disobeyed, there might have been evidence of that. The order itself is a thing done by a court of competent authority; and the presumption is that it was obeyed. Thirdly, the presentments ought to have been received, notwithstanding the objections, which were, that they appeared to be copies; that nothing appeared to have been done upon them; and that they were made by a standing jury, as to which *Rex v. The Commissioners of Sewers for Somerset*, 7 East, 71, was cited. (The argument on this head of objection is not followed up, no decision having been given upon the points. *Maule* cited *Ex parte Taylor*, 3 Y. & J. 91.)

A rule nisi was granted, (April 25th,) against which

Ludlow, Serjt., and *R. V. Richards* showed cause in last Easter term. (a) As to the liability to repair, it is contended, on the other side, that, where a sea-wall is overthrown by extraordinary tempest, the commissioners of sewers may tax the level for the purpose of more expeditious repair, but the individual bound *ratione tenuræ* will be ultimately liable. That, however, is not so where the individual has been in no default. All the cases are explained by the words of the commission of sewers, stat. 23 H. 8, c. 5, sects. 2, &c., which, after reciting the mischiefs happening by the destruction of sea-walls, directs the commissioners to survey, &c., and as well to ordain and do according to the statutes, as also to inquire "through whose default the said hurts and damages have happened." The question here was, whether the wall, just before the storm, was in such a state as placed the defendants out of default; and the learned judge left it properly to the jury to say whether the wall was in sufficient repair on the 11th of October to resist ordinary weather and tides, and whether the damage happened by any default on his part. *Callis*, pp. 146, 147, the *Anonymous Case* in *Moore*, 62, pl. 173, and *Griffin's Case*, *Dalison*, 70; *S. C. Moore*, 69, pl. 187, as *Griffith's Case*, referred to in the note (ed. 1685) to *Callis*, p. 146, are strong authorities to show that, if the damage happens by violent tempest, without default in the party bound by prescription, he is excused. The language of *WALMESLEY, J.*, in *Keighley's Case*, 10 Rep. 139 a, also supports the proposition that, where there is no default in the individual, the public, and not he, is liable. In *Rex v. The Commissioners of Sewers for the Western Division of Somerset*, 8 T. R. 312, that doctrine was enforced in the argument against the rule, and adopted by Lord KENYON. In *Rex v. The Commissioners of Sewers for Essex*, 1 B. & C. 477, *ABBOTT, C. J.*, says, "Even where an individual is bound by prescription or otherwise to repair, still if

(a) April 30th. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Ja.

there be no default on his part, and damage is sustained by an extraordinary flood or tempest, the whole level must bear the loss and be contributory to the repairs." It is represented on the other side that, although the commissioners are bound, in such a case, to provide for the repair in the first instance, the individual is ultimately liable; but this is not borne out by the cases, or by the language of Callis in the passages which have been referred to. In *Rex v. Baker*, (a) on the Oxford circuit, where an individual was charged with repairs, the whole question turned on the condition of the wall at the time when the damage by tempest happened. The direction to the jury, therefore, in the present case was right. The former orders of the commissioners of sewers were properly rejected, for the reasons which prevailed at the trial. But, further, the proceeding here is criminal, and, therefore, the Court will not order a new trial. This point was much discussed, and the Court would not decide on granting a new trial, in *Rex v. Sutton*, 5 B. & Ad. 52. [Lord DENMAN, C. J. We can hardly consider this as a criminal proceeding.] The defendant may suffer fine and imprisonment. [Lord DENMAN, C. J. In a civil case he may be taken in execution.]

Talfourd, Serjt., and *Whateley*, contra. The direction of the learned judge led the jury to conclude that an individual could be liable to repair only in the case of an ordinary tempest. If there could be a larger liability, the judge should have brought it within the jury's consideration. A larger may exist in point of law. The commissioners of sewers are to inquire by whose default damages happen; but the quest is, also, by *what* default? Here some evidence of the more extensive obligation appeared; namely, the repairs done in 1813 and 1815. [COLERIDGE, J. The wall may not have been in perfect repair before those periods.] (b) It had not been presented as out of repair; the evidence showed that it was not so in 1815, before the accident; and the repair then performed cost a sum which no person would lay out unless convinced that he was liable. *Keighley's Case*, 10 Rep. 139 a, does not show that the liability now contended for may not exist. The form in which that case came under discussion is not stated: but it was before the Court of Common Pleas, and, therefore, the proceeding could not have been a *mandamus* or a presentment. Probably the question arose upon a rate. All that the case decides is that, on a sudden emergency, the commissioners may take measures for the present repair; not that the proprietor is not liable ultimately. And this is consistent with the illustrations there given by Lord COKE, who says that "in the case at bar, the law is grounded upon great reason: for although by the law one be bound to keep and repair it," (the wall,) "yet *impotentia excusat legem*, and that which comes by the act of God, and is so inevitable, that by no providence or industry of him that is bound, it can be prevented, shall not charge him: and, therefore, if tenant for life or years does not repair a sea-wall, so that by his fault the land is drowned, and becomes unprofitable, it is waste; but if the land is drowned by the extraordinary rage and violence of the sea without his fault, it is no waste; no more than if a house is burnt by lightning, or overthrown by the rage of the wind or tempest, without

(a) Not reported. See the case at Gloucester, referred to by Best, C. J., in *Henly v. The Mayor of Lyme*, 5 Bing. 113, (15 E. C. L. R. 376.)

(b) See *Anonymous*, Moore, 62, pl. 173.

fault in the lessee, it is no waste." Yet in such cases the tenant would not the less be liable to repair within a reasonable time afterwards. In *Com. Dig. Wast*, (E 5,) it is said that the action of waste "does not lie, if the waste was by tempest, lightning, &c., if it be repaired in convenient time;" and *Keighley's Case* is referred to. The dictum accords also with that in *Rooke's Case*, 5 Rep. 100 a. [LITTLEDALE, J. Comyns also refers to Co. Litt. 53 a. In the following page (53 b.) Lord COKE says, "It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is no waste punishable." There, the qualification is not added.] The tenant is exempted from any present penalty to which he might be liable, but is not excused from repairing in proper time. Any language in *Rex v. The Commissioners of Sewers for the Western Division of Somerset*, 8 T. R. 312, which may seem to support the argument for the defendants, was extra-judicial. The question there turned upon the liability of the level to taxation in the first instance. Neither in that case nor in *Rex v. The Commissioners of Sewers for Essex*, 1 B. & C. 477, was it considered whether in particular cases an individual may not be obliged to repair, although the mischief be done by sudden inundation and tempest. In the case of liability *ratione tenuræ* to repair bridges, a violent influx of water does not excuse the landowner. In many places, and particularly that now in question, it might be very difficult to decide, on evidence, what could be considered the ordinary and what the extraordinary operation of the elements.

As to the rejection of evidence: the presentments were admissible on the principle, laid down in 1 Stark on Ev. 260, (ed. 2d,) under the head "Inquisitions," that the subject-matter is of public concern, and no one can properly be considered a stranger to it. The orders were admissible on similar grounds. They were not shown to have been acted upon; but they were themselves an act done: and they were in the nature of evidence of reputation, and therefore admissible, like the verdict (on which no subsequent proceeding had been grounded) in *Brisco v. Lomax*, 8 A. & E. 198, (35 E. C. L. R. 371.) At any rate, they were evidence against the laws of Porton.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, May 27th, delivered the judgment of the Court.

In this case the defendants were charged, by reason of their tenure, with the repair of a sea-bank. The defence was, that the wall was in a state of repair sufficient to resist the ordinary action of tides and weather, and that the damage was done by an excessive and outrageous tempest, and not by any of those accidents of ordinary occurrence to which such a liability must be restricted. The learned baron who presided left this question to the jury, who thereupon acquitted the defendant. A rule for staying the judgment and proceedings, till a second trial could be had, was obtained, on account of this direction, as well as for the rejection of evidence tending to show that the defendants and their predecessors who held the same lands had in fact repaired against the effects of the more violent tempests.

After argument, and consulting the authorities, we are clearly of opinion that a liability of a more extended nature may well exist by law. Many prescriptive liabilities to repair must have existed before

the date of the earliest statute for the issuing of commissions of sewers many such may now exist where no commission has issued: in such cases there is no legal reason to limit the liability by any thing but the ability of the party liable, or the value of the lands granted, as the case may be. And it is clear that a commission of sewers can have no effect upon these liabilities, other than to provide intermediately for the safety of the level, before the individual chargeable shall have been compelled, or be able to restore the defences. Callis (pp. 144, 145) is express that the commissioners are bound by precedent prescriptions, customs, and tenures, and we think that, rightly understood, there is nothing either in *Rooke's Case*, 5 Rep. 99 b, or *Keighley's Case*, 10 Rep. 139 a, that at all conflicts with the law as we have stated it.

We do not take upon us to say what was the extent of the defendant's liability in the present case; but there was evidence to show that it went beyond that to which the direction of the learned judge might lead the jury to suppose it limited by law; and the jury therefore ought to have decided upon it as a matter of fact, upon all the evidence.

The evidence here rejected was two-fold. First: Orders of the court of sewers made a hundred years ago, which were deemed inapplicable, because they were not proved to have been carried into effect. Secondly: Presentments by the jury, to which the same objections were made. We are very clearly of opinion that such orders were good evidence, as adjudications by a court of competent jurisdiction over the subject-matter, unless they were affected by proof of fraud or collusion; and that at so great a distance of time their execution might well be presumed. On the admissibility of the presentments we prefer giving no opinion, as the facts are not quite clearly before us. Perhaps it may not be thought prudent to tender them on the next trial.

Rule absolute.

EARLE against BROWNE.—p. 412.

In 1835 B. granted a life annuity of 180*l.* to E., secured by a warrant of attorney, on which judgment was entered up, by an assignment of a pension, and by a power of attorney to receive it in payment of the annuity. A memorial of this grant was duly enrolled. In 1837, the parties, at the request of B., executed an indenture, whereby E. covenanted to accept an annuity of 150*l.* in lieu and satisfaction of the former one of 180*l.*, and B. covenanted not to redeem it for a certain period; and it was declared that the annuity deed of 1835 and all collateral securities should be securities for the payment of the reduced annuity:

Held, that the latter annuity was void, under stat. 53 G. 3, c. 141, s. 2, for want of enrollment; and the Court, upon motion, set aside, not only the annuity deed of 1837, but also that of 1835, together with the warrant of attorney and judgment thereon, and the power of attorney to receive the pension.

Held, also, that the Court had no power to impose terms on B.

ON 13th February, 1835, the defendant, with two sureties, in consideration of the sum of 1200*l.*, covenanted with the plaintiff, by deed, to pay him an annuity of 180*l.* during defendant's life, secured by an assignment of a pension of 500*l.* per annum awarded to him by the Lords of the Treasury by way of compensation for the loss of an office in the customs; and at the same time executed separate warrants of attorney by way of collateral security, and also a power of attorney, enabling the plaintiff to receive the whole of his pension in payment of the annuity. A memorial of the annuity so granted on the above terms was duly enrolled. In 1837, defendant applied to plaintiff to reduce the amount of the annuity, which the latter consented to do, rather than

allow it to be redeemed. A further deed was thereupon, on 6th May, 1837, executed by and between the above parties, whereby the plaintiff covenanted with the defendant and the two other grantors of the said annuity to accept an annuity of 150*l.* in lieu of 180*l.*; and the defendant and his two co-grantors, in consideration of the said covenant by the plaintiff, covenanted not to redeem the annuity before the 10th April, 1842. It was further declared, by the last-mentioned deed, that the deed of February, 1835, and the collateral securities for the annuity of 180*l.*, should be securities for the payment of the annuity of 150*l.*, in the same manner as if the last-mentioned annuity had been granted by the deed of 1835 instead of the annuity of 180*l.* No memorial of the deed of 6th May, 1837, was ever enrolled.

In Trinity term, 1838, Sir *W. W. Follett*, on the part of the defendant (who had become insolvent) and his assignees, upon the above statement of facts appearing upon affidavit, obtained a rule nisi to set aside the annuity deeds, the warrant of attorney and a judgment thereon, the power of attorney, and all other deeds and documents given to secure the annuities granted as above, on six different grounds; one of which was, that the deed of 6th May, 1837, was never enrolled according to stat. 53 G. 3, c. 141, s. 2. As the judgment of the Court was founded upon this objection only, the rest are here omitted.

In opposition to the above rule, affidavits were filed stating, among other things, that the reduction of the annuity was made at the urgent request of the defendant Browne, in order to enable him to obtain a further advance of money on the same security; that he had become insolvent; that his assignees had applied without success to the Commissioners of Customs to pay his pension to them, and not to the plaintiff; that the Court for the Relief of Insolvent Debtors had refused to send a recommendation to the Commissioners to pay the pension, or any part thereof, for the general benefit of the creditors, because it had been duly assigned before the petition of the insolvent; and that the application to set aside the annuity was made solely at the instigation of the assignees. It further appeared that the deed of May, 1837, was, in form, a covenant by the plaintiff with the defendant and each of the two other grantors of the original annuity, "to accept and take an annuity or yearly sum of 150*l.*, to be paid at the same times and in the same manner as, by the within written indenture, is provided for the payment of the within mentioned annuity or yearly sum of 180*l.*, in lieu and full satisfaction of the annuity or yearly sum of 180*l.*, covenanted to be paid and secured by the within written indenture."

Erle and *Miller* now showed cause. The deed of 1837 was not a grant of a fresh annuity, but only a covenant, on the one part, not to redeem for a certain period; on the other, to take a less sum than the defendant was originally bound to pay. It was a release of 30*l.* out of every annual payment of 180*l.* The object of the statute was the protection of the grantor; and this has been satisfied by the enrolment of the original grant. The second transaction was a mere indenture of mutual covenants, entered into at the request and for the benefit of the defendant. In *Aston v. Gwinnell*, 3 Y. & J. 136, there was an additional charge, not mentioned in the memorial; yet the grant was upheld. At all events, the Court will not, upon this ground of objection, set aside more than the last instrument; for the omission to enrol a memorial of an alteration in the terms of a previous valid annuity cannot vitiate such annuity, nor entitle the Court to set aside all the previous securities.

Kelly, contra. The instrument executed in 1837, was an essential alteration of the former terms, not only in favour of the defendant, but also of the plaintiff. The annuity was then made irredeemable for a certain time; and this was one of the considerations for the reduction in the annual sum. The old security is superseded by the new one, and is kept on foot only as a security for the latter. The memorial now contains neither a true statement of the consideration, nor of the annual sum. The giving up the former annuity upon new terms constitutes the consideration for which the reduced annuity was granted. To enforce the second transaction, under such circumstances, would defeat the intention of the legislature. Then, as the old securities and judgment thereupon are expressly made securities for the second annuity, it follows, of course, that the Court will set aside all, and not merely the unenrolled instrument. [PATTESON, J. *Hammond v. Foster*, 5 T. R. 635, nearly resembles your case.] There, the original deeds were set aside, because there was an attempt to make them securities for a second invalid transaction.

Lord DENMAN, C. J. I have no doubt on the case. We shall repeal the statute, if we decide that this second annuity need not be registered; for there will be a total absence of that security which the legislature has required. We are bound to set aside the second bargain, because that is now the real one between the parties; and, as the former securities, and the judgment thereon, have become securities for the latter bargain, these also must be set aside.

LITTLEDALE, J. The alteration of an annuity requires enrolment just as much as the original grant.

PATTESON and WILLIAMS, Js., concurred.

Erle. Will the court impose terms on the defendant?

Per Curiam. We have no power to do so.(a)

Rule absolute to set aside and vacate the annuity deeds of 13th February, 1835, and 6th May, 1837, together with the warrant of attorney and judgment thereon, and the power of attorney given by defendant to plaintiff to receive the pension or compensation allowance of defendant of 500*l.* per annum. Rule discharged as to so much as relates to all other deeds and documents given to secure the annuities by the first-mentioned deeds granted.(b)

(a) See *Ex parte Lewis*, 2 A. & E. 135, (29 E. C. L. R.)

(b) As to the power of setting aside annuity deeds in a summary way for defects other than those mentioned in sect. 6 of 53 G. 3, c. 141, see the cases on the old stat. 17 G. 3, c. 26. *Symonds v. Cobourne*, 1 B. & P. 482. *Storton v. Tomlins*, 2 Bing. 475.

The QUEEN against The Inhabitants of STAFFORD.—p. 417.

The QUEEN against The Inhabitants of COSTOCK.

A man having, in 1836, married a widow with children by her first husband, ran away and left them chargeable to the parish. Held, that the children above the age of nurture might, notwithstanding stat. 4 & 5 W. 4, c. 76, s. 57, be removed from their mother to the place of her first husband's settlement, though they were under the age of sixteen.

Where a child within the age of nurture is removed from its mother, and that fact appears on the face of the order and in the special case, yet the Court of Queen's Bench will confirm it, unless the objection was relied upon in the notice of the grounds of appeal.

THE two following cases in the Crown paper were argued at the same time by the direction of the Court.

In *The Queen v. The Inhabitants of Stafford* an order for the removal of John, William, and James Blackbourne, of the ages of eight, seven, and two, respectively, children of John Blackbourne, deceased, by his wife Anne afterwards Anne Ford, from the township of Maltby in the West Riding of the county of York, to the parish of Stafford in the county of Stafford, was on appeal confirmed as to the two elder children, and quashed as to the youngest, subject to the opinion of this Court on the following case.

Anne Ford, the mother of the three children named in the order, is now the wife of James Ford, to whom she was married in October, 1836. Her late husband, John Blackbourne, who died in 1834, was settled in Stafford. The question is, whether the two elder children of John Blackbourne, (both of whom, at the time of making the order, were above the age of seven years,) having gained no settlement in their own right, are removable from Maltby to Stafford, their late father's settlement; James Ford, their stepfather, whose settlement is in Maltby, having run away and left his wife and her aforesaid children chargeable to the township of Maltby.

Pashley and *J. T. Ingham*, in support of the order of sessions. *Rex v. Walthamstow*, 6 Ad. & E. 301, (33 E. C. L. R.,) and *Regina v. Wendron*, 7 Ad. & E. 819, (34 E. C. L. R.,) are in point. They decide that the settlement of the children of a former marriage is unaltered by the provisions of 4 & 5 W. 4, c. 76, s. 57. Then the children, being above the age of nurture, must be removed; and the appellant parish may enforce the law against the stepfather, if he can be found, and charge him with their support.

Sir Gregory A. Lewin and *Dundas*, contra. The question is, whether the children are removable to their place of settlement until the age of sixteen. The act makes them "part of the "family" of the second husband. They are, therefore, irremovable from his family. Sect. 71 shows the intention of the legislature: it enacts that a bastard shall follow the mother's settlement till the age of sixteen, and shall be maintained by her "as a part of her family." This shows that the object was to keep the child under the immediate protection of the mother; and there seems no good reason why a legitimate child should be in a worse condition in this respect than a bastard. If the father were of ability to maintain the children, there could be no removal. Suppose, then, that he returns to Maltby, and is able to support them, are they to be removed back to Maltby? If they are, is the removal to be at the expense of Stafford?

In *The Queen v. The Inhabitants of Costock*, an order for removal of two children of J. Dexter, deceased, aged respectively eight and six, by Susannah, his wife, afterwards the wife of W. Marviler, from the parish of Radford in the county of Nottingham, to the parish of Costock in the same county, was on appeal confirmed, subject to the opinion of this Court on the following case.

The paupers are the legitimate children of J. Dexter and Susannah his wife. In September 1834 J. Dexter died, being, at the time of his death, lawfully settled in the appellant parish of Costock. In August 1836 Susannah, his widow, was married to William Marviler, who is lawfully settled in the respondent parish of Radford, and, at the time of making the order, her two children, the paupers, were residing with

her in the workhouse of Radford and actually chargeable to that parish. The grounds of appeal, as stated in the notice, were as follows. "The parish of Costock appeals against the removal of Lucy and Joseph Dexter from the parish of Radford, because the 4 & 5 W. 4, c. 76, s. 57, enacts that every man who shall marry a woman, having a child or children, shall be liable to maintain such child or children as a part of his family; nor, in the case of the step-father of these children, is there sufficient evidence that he is unable to maintain them without the assistance of his parish, until, and only so long as, he is receiving relief in the workhouse. The parish of Costock does not deny the settlement of these children, but only their liability for their support so long as they are under the age of sixteen, and their mother shall continue the wife of William Marviler." No evidence was offered on either side as to the circumstances of William Marviler.

N. R. Clarke and Wildman, in support of the order, relied on the cases cited above in *Regina v. Stafford*.

Whitehurst and Willmore, contra. The parish of Radford is bound to support the children as part of their step-father's family, though their settlement may be in Costock. The object of the statute is to extend the period of nurture to sixteen years, and to prevent the separation of mother and child during that time. [PATTESON, J. The words of sect. 57 are, such "children shall, for the purposes of this act, be deemed a part of such husband's family," not for the purposes of nurture, or any other purpose.] One purpose is that of maintenance. The father is made "chargeable" for relief given to such children: now "chargeable" is a technical word, implying parochial relief given to the father, which must necessarily be by the parish in which the father is settled. So sect. 56 enacts that relief to such children under the age of sixteen shall be considered as relief to the second husband, which can only be given regularly by the parish in which the latter is settled. In fact, the children are not chargeable at all, but the father in respect of the children. The removal of the children will occasion difficulties in carrying into effect the act: thus sect. 58 enables the commissioners to declare relief, given to the husband, to be given by way of loan: and sect. 59 provides a remedy for repayment of the loan by process, at the suit of the relieving parish, against the master or employer of the pauper for the purpose of attaching any wages that may be due; and, upon default of the master, payment is to be enforced in "the like manner as penalties and forfeitures are recoverable under this act;" viz. by distress and sale, under sect. 99. Now the penalties, when so levied, are to be paid, "to or for the use of the parish or union where such offence shall have been committed, to be applied in aid of the poor rate of such parish or union." So that, if the children are to be relieved by a distant parish, who are to recover the amount from the step-father's master, it will generally happen that the wages so recovered will go to increase the funds of another parish than the one that is to be reimbursed. Independently of this objection, it appears on the face of the order of removal, and of the special case, that one of the paupers is under the age of nurture; and, though no objection on this ground was made in the notice of the appellants, yet, as the objection appears on the face of the proceedings, both the court of quarter sessions and this Court will notice it. [*Rex v. Bromyard*, 8 B. & C. 240, (15 E. C. L. R.), *Rex v. Boulton*, 4 A. & E. 498, (31 E. C. L. R.), *Rex v. Withernwick*, 6 A. & E. 273, (33 E. C. L. R.), were cited, contra.]

LORD DENMAN, C. J. The decision of the sessions in both cases is right. The children are still to be maintained by the parish which was liable to support them before the second marriage of their mother; and they may be removed accordingly. With respect to the additional point made in the second case, no advantage can now be taken of any objection which was not adverted to in the notice of the grounds of appeal.

LITLEDALE, J. The language of the 71st section differs from that of the 57th, which must, therefore, be interpreted by itself. In the 71st section the settlement of the child is provided for in express terms. In the 57th there is no such provision.

PATTESON, J. *Rez v. Walthamstow*, 6 A. & E. 301, (33 E. C. L. R.,) and *Regina v. Wendron*, 7 A. & E. 819, (34 E. C. L. R.,) show that the settlement of the children is neither altered nor suspended for all purposes. The question is, whether they are irremovable during the life of the step-father, and before the age of sixteen? It is clear that upon his death they are removable; yet the mother will then have acquired the settlement of her second husband, and therefore be separated from her children. So that the argument drawn from the supposed intention of the legislature to keep them under the mother's protection fails. As to any difficulties that may arise in carrying into effect the 59th section, from the removal of the children into a different parish, we cannot on that account put a forced construction on the words of the previous section, which are satisfied by holding that the father shall be liable to reimburse the parish in which the children are settled, and from which they receive relief.

WILLIAMS, J., concurred.

Order of Sessions confirmed in both cases.

The QUEEN against JAMES.—p. 423.

The notice of an application for an order in bastardy, under stat. 4 & 5 W. 4, c. 76, s. 73, signed by the churchwardens and overseers of the parish, is sufficient, though the parish is part of a union under sect. 26 of the Poor Law Amendment Act, and none of the guardians have signed it.

At the quarter sessions of the county of Carmarthen, an order was made on Theophilus James to reimburse, and to pay a weekly sum to, the parish officers of Conwil in Elvet, for the maintenance of a bastard child, subject to the opinion of this Court on the following case.

At the quarter sessions in July, 1838, an application was made to the Court by the overseers of the parish of Conwil in Elvet in that county for an order in bastardy against T. James, under stat. 4 & 5 W. 4, c. 76, for the maintenance of a male bastard child born of S. Jones, and chargeable to the said parish.

The applicants having gone through the necessary proof, and satisfied the Court by corroborative evidence as to the liability of T. James, an objection was raised on his behalf to the sufficiency of the notice of the intended application, which was in the following form.

To T. James of M. in the county of Carmarthen;—Whereas S. J., late of, &c., single woman, was on, &c., delivered of a male bastard child, and the said child, by reason of its said mother being unable to provide for its maintenance, on, &c., became chargeable to the parish of Conwil in Elvet, and from thence hitherto has been maintained by the said parish: and whereas the undersigned, being the churchwarden and the

overseers of the poor of the said parish, have made diligent inquiry as to the father of the said child, and find that you are the father of the same: Therefore take notice that, at the next general quarter sessions of the peace to be holden, &c., we, as such churchwarden and overseers, intend to make application to the Court for an order upon you to reimburse the said parish for the maintenance of the said child. Given under our hands, &c.

D. T. }
H. D. } Churchwarden,
D. D. } and Overseers.

It was admitted that the parish of Conwil in Elvet was one of several parishes united by the commissioners under stat. 4 & 5 W. 4, c. 76, into an union called the Carmarthen Union, and that it returned one guardian as its proportion to the board; that the notice was only signed by the churchwarden and overseers of the parish, and that it was not signed by the guardian returned by the parish, or by any other guardian of the union. The objection taken to its sufficiency was that, since the formation of unions under the said poor law act, the churchwardens and overseers of any parish, being within an union and returning a guardian to the board, were not the proper persons to sign notices of this description. It was contended for the respondent that the notice should be signed by the guardians of the union or a competent part thereof; or that, at all events, it should have been signed by the guardian returned by the parish. The Court overruled the objection, but suspended the order until the opinion of the Court could be obtained thereupon.

Chilton and Byles, in support of the order, were stopped by the Court.

E. V. Williams and R. C. Nicholl, contra. Section 72 enacts that the "overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general quarter sessions," &c. By sect. 73, "No such application shall be heard at such sessions unless fourteen days' notice shall have been given under the hands of such overseers or guardians, to the person intended to be charged," &c.; and, by the same section, full costs and charges shall be paid "by such overseers or guardians," if the Court does not make the order of filiation. The reasonable construction of the act is, that, where there are guardians, the guardians shall apply; where there are none, then the overseers shall apply. Any other construction will give occasion to difficulties, and defeat the object of the act. Where there is an union, "the ordering, giving, and directing of all relief to the poor" is under the control of the guardians alone; and the overseers can give none, except with their sanction, or in cases of urgency; sect. 54. Now *Regina v. The Justices of Cambridgeshire*, 7 A. & E. 480, (34 E. C. L. R.), (a) decides that the maintenance of bastards is "a matter connected with the relief of the poor." It is, therefore, a matter in which the legislature has thought it inexpedient to trust the overseers, where there are guardians. If either may apply, then both may do so, and the sessions may be at a loss which of the concurrent applications is to be heard first, or whether both are to be heard; and the party may be harassed by double proceedings, of which he may have to pay the costs. All these questions are avoided, and the act receives a consistent and sensible construction, reddendo singula singulis. Where there are guardians under stat. 22 G. 3, c. 83, (Gilbert's act), it would be clearly

(a) See the judgment, 7 A. & E. 490.

inconsistent with its provisions to permit applications to be made by churchwardens and overseers.

LORD DENMAN, C. J. The notice is agreeable to the provisions of the act, and is given by the proper persons.

LITLEDALE, J. Either the overseers or guardians may give the notice.

PATTESON, J. The parish, and not the union, is interested in the application. There is no common fund applicable by the union to any purposes, except those which affect the whole union; the expense of maintenance falls exclusively on the parish. It is, therefore, not unreasonable that the parish officers should have the power to apply for an order.

WILLIAMS, J., concurred.

Order confirmed.(a)

(a) See 2 & 8 Vict. c. 85, and *Regina v. The Justices of Wilts*, post, *Sittings in Banco* after M. T. 1840.

DOE on the several demises of GRAVES and DOWNE against WELLS and TROWBRIDGE.—p. 427.

A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own.

EJECTMENT for lands in Wiltshire. The several demises were alleged in the declaration to have been made on 17th October, 1836, habendum for seven years, from 15th October, 1836. After pleas pleaded, Wells compromised with the lessors of the plaintiff, but Trowbridge continued to defend. On the trial before PATTESON, J., at the Wiltshire Summer assizes, 1837, it was proved, on the part of the plaintiff, that Graves, the lessor of the plaintiff, was entitled to the reversion upon a lease under which Trowbridge held, which lease was for ninety-nine years, to end in 1888, determinable on certain lives not yet expired, at a rent. It was further proved that, on 17th October, 1836, Graves's agent, in a conversation with Trowbridge, who was then in possession, demanded the rent of him, but Trowbridge then refused to pay it, and asserted that the fee was in himself. The counsel for the plaintiff contended that this was a disclaimer, working a forfeiture of Trowbridge's term; the defendant's counsel disputed this, and contended further that, even supposing this to be a forfeiture, the demise was laid too early, being on the very day of the supposed forfeiture. The learned judge directed the jury to find for the plaintiff, if they were of opinion that the words used by Trowbridge were not mere idle language, but a serious claim of the fee. The jury having found for the plaintiff, the learned judge reserved leave to the defendant's counsel to move to enter a verdict for the defendant. In Michaelmas term, 1837, *Crowder* obtained a rule accordingly.

Erle and *Burstow* now showed cause. As to the day of the demise, *Roe dem. Wrangham v. Hersey*, 3 Wils. 274, shows that it may be the day on which the title of the lessor of the plaintiff accrues. There the title, it is true, accrued by death of the ancestor, not, as here, by disclaimer; but that can make no difference. *Doe dem. Lewis v. Cawdor*, 1 Cr. M. & R. 398; S. C. 4 Tyrwh. 852, (a) was a case of disclaimer: but in that case there was nothing to carry back the disclaimer even to the day of the demise. Secondly, the disclaimer here worked a forfeiture. That takes place wherever the tenant does any

(a) See *Doe dem. Mee v. Litherland*, 4 A. & E. 784, (31 E. C. L. R. 179.)

act inconsistent with the relation of landlord and tenant, especially if derogatory to the landlord's title. In *Doe dem. Ellerbrock v. Flynn*, 1 Cr. M. & R. 137; S. C. 4 Tyrwh. 619, the tenant gave up possession to a hostile claimant, in fraud of the landlord, for the purpose of enabling the claimant to set up the adverse title against the landlord: and this was held to be a forfeiture of the tenant's term. So a disclaimer dispenses with a notice to quit, even where it is doubtful whether there be a term to which the disclaimer will apply; here the term is clearly shown to have existed at the time of the disclaimer. [LITLEDALE, J. There are several cases in Com. Dig., *Forfeiture*, (a) of forfeiture by acknowledging a hostile title on record.] In *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, (b) Lord REDESDALE assumed that the assenting by a tenant to the claim of a stranger was a forfeiture. It is not necessary that the disclaimer should be on record: a record is merely a stronger evidence than an act in pais. In the case of *Lord Dormer's ejectment* (c) it was held that a term was forfeited, where a termor assigned it to a trustee, and then made a feoffment to gain the freehold. The principle, according to Mr. Preston, (c) is that the term is forfeited by the fraud of the termor in attempting to gain the freehold; and that the admission (by the assignee) of a title to the reversion in a stranger is an attornment, which works a forfeiture, because it is an abandonment of the tenancy and a destruction of the privity between the termor and the reversioner. [LITLEDALE, J. What is the act done in the present case?] The making a claim of the freehold by the termor. [LITLEDALE, J. Is that an act?] It is an act within the principle of the authorities. In 4 Bac. Abr. 884, (7th ed.), *Leases*, [T. 2,] it is said, "Here it is to be observed, that any act of the lessee, by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of the lease. For to every lease the law tacitly annexeth a condition, that if the lessee do any thing that may impair the interest of his lessor, the lease shall be void, and the lessor may re-enter. Indeed, every such act necessarily determines the relation of landlord and tenant; since to claim under another and at the same time to controvert his title, to hold under a lease, and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency. A lessee may thus incur a forfeiture of his estate by act in pais, or by matter of record." No instances perhaps can be adduced of a forfeiture of a term for a given number of years by mere words claiming the title: but such a case is clearly within the principle. If a stranger bring waste against the tenant, and the tenant plead *no waste done*, the term is forfeited. Com. Dig., *Forfeiture*, (A 5,) citing Co. Litt. 252 a, and 1 Rol. Abr. 853, *Estate*, (G,) pl. 11. That is on the ground that such pleading creates a difficulty to the landlord. A conveyance to operate by the statute of uses works no forfeiture, because, being innocent, it does not hurt the title of the landlord. A tenancy from year to year is put an end to, without notice, by a disclaimer. There can be no distinction, in this respect, between a term for a given number of years, and a tenancy from year to year: there might be a term created for a hundred years, determinable at any time by half a year's notice from either party. The greater number of the old authorities indeed speak of a forfeiture of a life estate; but this arises only from

(a) See (A 5.)

(b) See p. 625.

(c) See note (b) to *Doe dem. Madduck v. Lynes*, 3 B. & C. 399.

terms being comparatively modern. A forfeiture of a tenancy from year to year is, legally, a forfeiture of a term: the decisions, in such cases, have not rested upon the principle that the disclaimer showed that no term existed, for then no notice would have been necessary at all; whereas the professed principle has always been that notice was dispensed with by the disclaimer. Thus, "if a tenant hold from year to year, the landlord cannot maintain an ejectment without giving six months' previous notice, unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord; and in that case no notice is necessary;" *Throgmorton v. Whelpdale*, Bul. N. P. 96. In *Doe dem. Gray v. Stunton*, 1 M. & W. 695; S. C. Tyrwh. & G. 1065, (a) a tenant from year to year claimed verbally to hold the estate as his own, but under such circumstances that the Court considered the claim not necessarily inconsistent with the tenancy; and, therefore, it was held that there was no forfeiture: but the Court said, "it does not appear to be necessary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient;" adding, "but, in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it." These remarks establish fully the doctrine for which the plaintiff contends; and this, as well as the case of *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 625, show that Lord Coke is incorrect in saying that an attornment *in pais* works no forfeiture; Co. Lit. 252 a. In *Doe dem. Lewis v. Caudor*, 1 Cr. M. & R. 398; S. C. 4 Tyrwh. 852, the disclaimer insisted upon was by letters: but there was no forfeiture, because the Court thought the language of the letters did not go far enough. In *Doe dem. Grubb v. Grubb*, 10 B. & C. 816, 21 E. C. L. R. 174, it was held that a tenancy from year to year was determined by the tenant having written a letter to the reversioner's attorney, stating that his connection as a tenant had ceased for several years. A copyholder's estate is, on a feudal principle, similar to that now contended for, forfeited by default of attendance where there is sufficient notice; *Sir John Braunche's Case*, 1 Leon. 104, *Anonymous Case* in Godbolt, Godb. 142; pl. 176, where it is said that a refusal by a copyholder to pay rent, because he hath it not, "is no forfeiture, but the denial ought to be a wilful denial;" which shows that a wilful denial will work a forfeiture. It may be urged that tenancies will be endangered by applying the rules of forfeiture so stringently: but the Court will not deviate from the authorities upon such considerations. The legislature, when they provided against surrenders not made by writing, in stat. 29 C. 2, c. 3, s. 3, did not prohibit forfeitures by word of mouth.

Crowder and Butt, *contra*. Supposing the Court to be of opinion that the case, as to the first point, is within the authority of *Roe dem. Wrangham v. Hersey*, 3 Wils. 274, still there is here no forfeiture. Assuming the language to have been as strong as possible, and to have amounted to a distinct repudiation of the landlord's title, and a claim of the freehold by the tenant, yet there is no authority for treating this as a forfeiture of the term. It is true that a lease for years may be

(a) See *Doe dem. Williams v. Cooper*, 1 Man. & G. 135.

subjected to forfeiture under the same circumstances as a life estate; but in neither of the passages referred to, on the other side, in *Bacon* and *Comyns*, is there any instance of a forfeiture of estate by mere words. From Co. Lit. 251 a, 251 b, 252 a, it appears that a forfeiture may be worked by alienation,—and that either *in pais* or by matter of record;—or by claiming too great an estate, or affirming the reversion or remainder to be in a stranger,—and these only by matter of record. But even a feoffment without livery, or a conveyance in fee by lease and release, work no forfeiture, because, though they are, in principle, disavowals of the reversioner's right, they divest no estate. It is said that the effect of a record is merely to strengthen the evidence: but the authorities confine forfeitures of this kind to matter of record. Thus in 3 Bac. Abr. 196, 7th ed., *Estate for Life and Occupancy*, (C,) it is said, "Another way of forfeiture in a court of record is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such a denial was a forfeiture. Now this denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges the reversion to be in a stranger; for in all these cases he denies that he holds the feud from the lord: but as, by the feudal law, the vassal was to be convicted of this denial, so, in our law, these acts, which plainly amount to a denial, must be done in a court of record, to make them a forfeiture; for such act of denial appearing on record, is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause: but the denial of the tenure upon record could never be counterfeited, or be abused to any injustice; and therefore this notorious and solemn act of the tenant was retained as a just cause of forfeiture by our law." In the words following the passage cited on the other side, from 4 Bac. Abr. 884, 7th ed., *Leases and Terms for Years*, [T. 2,] the forfeiture by act *in pais* is confined to alienations which displace the estate of the reversioner. The doctrine of disclaimer was, perhaps, carried farther in *Doe dem. Ellerbrock v. Flynn*, 1 Cr. M. & R. 137; S. C. 4 Tyrwh. 619, than elsewhere: but even there the tenant had done an act by giving up the possession for the purpose of defeating his landlord's title. Here there is no act done; and the landlord does not appear to be in any way damnified. The Statute of Frauds, 29 C. 2, c. 3, s. 3, has been referred to; but it is clear that the general intent of the legislature was to provide against the effect of mere oral declarations. Forfeitures by words spoken were not provided against, because they were not recognised before. The dictum in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 625, is, as admitted on the other side, contrary to the doctrine of Lord Coke: and, as the decision in that case was, that there was no forfeiture under the particular circumstances, the dictum is extra-judicial: but, assuming it to be correct, an attornment is still an act. It is true that notice to quit may be dispensed with in the case of tenancies from year to year, by proof of words spoken by the tenant: but that is because such a tenancy is from year to year so long as the parties please: and such words may be proof that

the will of the tenant was determined. Such cases are not instances of forfeiture at all. As was said by BEST, C. J., in *Doe dem. Calvert v. Frowd*, 4 Bing. 557, "a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence." *Throgmorton v. Whelpdale*, Bul. N. P. 96; *Doe dem. Gray v. Stanion*, 1 M. & W. 695; S. C. Tyrwh. & Gr. 1065; *Doe dem. Grubb v. Grubb*, 10 B. & C. 816, (21 E. C. L. R. 174,) were cases of tenancy from year to year: and no greater estate was shown to exist in the defendant in *Doe dem. Lewis v. Cawdor*, 1 Cr. M. & R. 398; S. C. 4 Tyrwh. 852.

LORD DENMAN, C. J. I think *Doe dem. Ellerbrock v. Flynn*, is distinguishable from the present case. There, it was thought that the tenant had betrayed his landlord's interest by an act that might place him in a worse condition: if the case went farther than that, I should not think it maintainable. The other instances are cases either of disclaimer upon record, which admit of no doubt as to the nature of what is done, or of leases from year to year, in speaking of which the nature of the tenancy has been sometimes lost sight, and the words "forfeiture" and "disclaimer" have been improperly applied. It may be fairly said, when a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited. But no case, I think, goes so far as the present: and I feel the danger of allowing an interest in law to be put an end to by mere words.

LITTLEDALE, J. We should not, indeed, be justified in putting an end to a state of law on account of its danger; for we must give parties whatever the law entitles them to: but here the law leads to no such consequence. The case is not like that of a tenancy from year to year, which lasts only as long as the parties please, and where what has been called a disclaimer, is evidence of the cessation of the will. Here property is claimed on the ground of forfeiture. Now, assume the jury to have been right in their verdict: still the facts do not go far enough for a forfeiture. In Comyn's Digest, tit. *Forfeiture*, and in Viner's Abridgment, tit. *Estate*, (a) a very great number of instances of forfeiture are given; but there is no allusion to any case of this kind: the instances are either of matters of record, or of acts in pais quite different from what is here insisted upon. In an *Anonymous Case* in Godbolt, Godb. 105, pl. 124, the tenant claimed the fee on the record, in an action of debt; and yet it was held to be no forfeiture. *Doe dem. Ellerbrock v. Flynn* has been satisfactorily distinguished by my lord.

PATTESON, J. No case has been cited where a lease for a definite term has been forfeited by mere words. We know that mere words cannot work a disseisin, although some acts have been held to work a disseisin at the election of the party disseised, which, as against him, would not work a disseisin. An attornment again is an act. Here there is no act; and, if we held that there was a forfeiture, we should be going much beyond any previous decision. It is sometimes said that a tenancy from year to year is forfeited by disclaimer; but it would be more correct to say that a disclaimer furnishes evidence in answer

(a) See 10 Vin. Abr. 370, sqq. *Forfeiture*, (C. b.) &c.

to the disclaiming party's assertion that he has had no notice to quit, inasmuch as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy.

WILLIAMS, J., concurred.

Rule absolute. (a)

(a) See note (b) to *Sir Simon Leech's Case*, Freem. K. B. and C. P. 503.

JOSEPH COLES, REBECCA GOODE, and BENJAMIN COLES
Executors of TEMPERANCE CREED, against the Governor and
Company of the Bank of ENGLAND.—p. 437.

CASE by the executors of a stockholder against the Bank of England, for refusing to transfer stock of the testatrix, and to pay the dividends. It appeared that nearly all the stock had been sold and transferred in the lifetime of the testatrix by her nephew C., who had brought another woman to personate her, and forge her signature. After the sale, testatrix had repeatedly received the warrants for the reduced dividends in person, and had signed the warrants and the bank books, being on those occasions accompanied by C., who mentioned the amount of dividend in her presence. The jury found that she had the means of knowing of the transfer, but that there was no evidence of actual knowledge; that she had been guilty of gross negligence, and that the defendants had not been guilty of any:

Held, that the facts were a defence on the plea of Not Guilty.

Held, also, that they furnished evidence in support of pleas denying that testatrix was proprietor of the stock; and a plea denying that sufficient money had been received by defendants for paying the dividends.

CASE for refusing to transfer stock and pay dividends. The first count stated that Temperance Creed, at the time of her death, was proprietor of and lawfully entitled to a certain share or interest to a large amount, to wit, to the amount of 2220*l.* 16*s.* 9*d.*, of and in certain stock called the 3 per cent. consols, which in her lifetime was standing in her name in defendants' books, and had not, at the time of the committing, &c., been transferred or assigned by her or by plaintiffs, or any of them, or by any attorney lawfully authorized by them or any of them; and that plaintiffs, as her executors, were, at the time, &c., proprietors of, and lawfully entitled to, such share or interest, and entitled to transfer it: that it was the duty of defendants, at all reasonable times, to make or enter in the said books such transfer of the said share or any part thereof, as plaintiffs, as such executors, or either of them, should authorize or require: that plaintiff, Joseph Coles, as such executor, after the death of Temperance Creed, and at a reasonable time for that purpose, and for the benefit of plaintiffs as executors, requested defendants to suffer and permit the said share to be transferred in the said books into the name of one J. S., and to suffer to be made in said books a proper entry or registry of such transfer. Averment of offer by Joseph Coles to make the transfer and entry, and by J. S. to accept the transfer. Notice to defendants. Breach; refusal by defendants to make, or suffer to be made, such transfer or entry. Averment that in a reasonable time before making such request, the will of testatrix and probate thereof had been duly entered in the office of the Accountant General of the Bank of England, &c.

The second count, after introductory averments as in the first, stated the title of plaintiffs as executors to receive the interest and dividends on the above stock; that after the death of testatrix a large sum, to

wit, 3*s.* 6*s.* 3*d.*, for and on account of a half-yearly dividend in respect thereof, was due; that Joseph Coles, as executor, on behalf of himself and the other plaintiffs as executors, attended at the bank to receive said sum, and requested defendants to pay it to him on behalf of himself and the other plaintiffs; that, although sufficient money had, before such request, been duly issued, and received by defendants, (a) for the purpose of paying such dividend, and although it was the duty of defendants to pay it to plaintiff, J. C., as executor on request, yet defendants would not, when so requested, or at any other time, pay the said sum of money, or any part thereof, to plaintiffs, or either of them, as executors, or to any attorney duly authorized by them. Profert of letters testamentary.

Pleas. 1. Not Guilty. 2. As to first count, that Temperance Creed was not at the time of her death the proprietor of, or lawfully entitled to, the said share or interest in the said stock, *modo et formâ*. 3. As to the second count, same plea. 4. As to the second count, that sufficient money for paying the said dividend had not been received by defendants for the purpose in the second count mentioned, *modo et formâ*.

On the trial before Lord DENMAN, C. J., at the adjourned sittings after Trinity term, 1837, it appeared that the testatrix had from time to time bought stock in the 3 per cent. consols from the year 1819 until 1828, having made the last purchase on 29th April, 1828, at which time the whole amount of the several purchases was 2220*l.* 16*s.* 9*d.* She was in the habit of attending in person every half year to receive her dividends, and was, on those occasions, accompanied by her nephew, the plaintiff, Benjamin Coles, who, in her presence, mentioned the amount of the dividend. It further appeared that B. Coles, who was much trusted by the deceased, was a clerk at the bank, and, as such, well acquainted with the state of her account there; that he had, with her authority or knowledge, from time to time sold out portions of the stock by means of a woman whom he represented as Mrs. Creed, the deceased, and who forged the signature of Mrs. Creed to each transfer.

The sales were as follow:—

1827, August 7,	-	-	-	-	-	-	-	£500 stock.
1828, February 15,	-	-	-	-	-	-	-	250
March 16,	-	-	-	-	-	-	-	150
October 9,	-	-	-	-	-	-	-	250
November 25,	-	-	-	-	-	-	-	300
1829, April 22,	-	-	-	-	-	-	-	200
August 25,	-	-	-	-	-	-	-	300
1830, January 15,	-	-	-	-	-	-	-	150
July 9,	-	-	-	-	-	-	-	115
								<hr/> £2215

The last dividend received by the testatrix was on 120*l.* 16*s.* 9*d.* in July, 1830, just before the last sale by B. Coles. (b)

Upon receipt of the dividend, the testatrix always signed the dividend books, and also the dividend warrants, both of which show, on

(a) See *The Bank of England v. Davis*, 5 B. & C. 185, (11 E. C. L. R. 196.)

(b) See, further, as to these transactions, the statement of facts in the judgment, p. 448, post.

the face of them, the actual dividend paid. She died in August, 1830, at a very advanced age.

The probate was left by plaintiff, B. Coles, at the will office at the bank, when, according to the usual practice, he stated the amount of the claim to be "5*l.*, and some odd shillings." In fact it was 5*l.* 16*s.* 9*d.* The will was duly registered. On the detection of the fraud by his co-executors, he was indicted under 33 G. 3, c. 30, sects. 1 & 2, for the forgery, but was acquitted, and left the country.

In December, 1830, J. Coles and R. Goode, the co-executors, claimed to be admitted to transfer the whole sum of 2220*l.* 16*s.* 9*d.* The defendants, protesting against any legal liability, offered to replace 115*l.* stock, being the sum transferred on 9th July, 1830, but declined any further compliance with the plaintiffs' request. Whereupon this action was commenced by the two co-executors in the name of all. At the trial, the jury found, in reply to questions put to them by the lord chief justice, that, 1. The testatrix had the means of knowing that the transfers had been made; 2. There was no sufficient evidence that she did in fact know of them; 3. She had been guilty of gross negligence; 4. The bank had not been guilty of any negligence. A verdict was entered for the defendants, with liberty to move to enter a verdict for the plaintiffs. *Platt*, in the following Michaelmas term, obtained a rule to show cause why a verdict should not be entered accordingly for such amount as the Court should think fit; or a new trial had. In last Easter term

Sir *F. Pollock* and *Bayley*, showed cause. (*a*) There is no pretence for recovering in respect of the smaller sum, for there was no refusal to transfer it. The first count truly alleges a refusal to transfer the entire amount of original stock, but the defendants were never requested to transfer the less amount, nor would they, on request, have refused to do so. In this form of count, in which it is not even stated that the defendants refused to transfer the share "or any part thereof," the sum is indivisible and the plaintiffs must recover for all or none. Where a creditor draws for 50*l.* on his debtor who owes him only 500*l.*, the latter is not bound to accept pro tanto. As to the second count, the plaintiffs might have recovered a less dividend than the sum demanded; but there never was any refusal to pay it. If the action had been in form *ex contractu*, it might have been necessary for the defendants to plead a tender or readiness to pay the sum actually due; but here the question is, whether they have wrongfully refused to pay what was due. But the principal question is, whether the Bank of England can be made liable, in this, or indeed in any form of action, to replace stock transferred by a person professing to act for the proprietor, after the proprietor has repeatedly recognised the transfer by receiving dividends on the reduced amount? The repeated receipt of such dividends is a recognition of the transfer, which binds the party, and is not merely proof of a previous authority, which may be rebutted. The testatrix received the dividends in person, and on six different occasions signed the warrants and dividend books, which show upon the face of them the real amount paid. The amount was on each occasion mentioned in her hearing. Her advanced age, which was relied upon by the plaintiffs to rebut the charge of gross negligence, and to show that undue advantage had probably been taken of her, was only a topic

(*a*) 3d May, 1839. Before Lord Denman, C. J., Little Dale, Patteson, and Coleridge, Ja.

for the jury, and would have been equally available if she had herself received the money. Suppose a customer signs and settles his book with his banker after his balance has been reduced by forged drafts; can he bring money had and received for the original balance? There is nothing to show that the testatrix was not actually aware of the transfers, and it was on this ground that the plaintiff, Benjamin Coles, was acquitted upon the indictment. [Lord DENMAN, C. J. There is no doubt that, in fact, she did not know of them, but had been deceived by the fraud of her nephew.] Actual knowledge is not essential; it is enough that she had the means of knowledge, and that she had grossly neglected to avail herself of them. Ignorance of fact is no excuse where there is laches. *Bilbie v. Lumley*, 2 East, 469; *Milnes v. Duncan*, 6 B. & C. 671, (13 E. C. L. R. 293.) Whatever is sufficient to put a person upon inquiry is equivalent to notice; *Smith v. Low*, 1 Atk. 490. (a) Here, too, the person to whom the fraud is imputed is himself one of the plaintiffs, and must be taken to have known what he himself did. The gross negligence of the testatrix has misled the defendants, and has induced them to believe that the transfers have been effected with her consent. In such a state of facts the rule stated in *Pickard v. Sears*, 6 A. & E. 469, (33 E. C. L. R. 115,) and affirmed in *Gregg v. Wells*, ante, p. 54, is applicable, viz., that a person who wilfully acts so as to convey a certain impression to another, and induce him to alter his position accordingly, cannot afterwards be permitted, as against the party deceived, to show that the impression was unfounded. If then the negligence of the testatrix be a defence, it is evidence under either "not guilty," or the pleas deny the testatrix's property. That it is a defence under the general issue, is established by *Gough v. Bryan*, 2 M. & W. 770; and *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244. And the second plea is supported by proof that the stock has been transferred. The doctrine laid down in *Davis v. The Bank of England*, 2 Bing. 393, (9 E. C. L. R. 444,) that stock, sold under a forged power, is to be regarded as still standing in the original name, is not satisfactory, and has been since questioned. (b) But all difficulty on that point is avoided here by the repeated recognition of the sales, and the ratification of the acts of B. Coles by the testatrix. It is clear that, if alive, she might now sue him for the proceeds of the sales; *Stone v. Marsh*, 6 B. & C. 551, (13 E. C. L. R. 249;) *Marsh v. Keating*, 1 New Ca. 198, (27 E. C. L. R. 354;) and that the stock is, therefore, to be considered as no longer standing in her name. The form of the plaintiffs' action, if any, should have been case for improperly, and without authority, transferring the stock. By the form here adopted, the defendants are ousted of the plea of the Statute of Limitations; for if the stock is to be regarded as still belonging to the original stockholder, no lapse of time after the transfer can divest him of his right to sue. Another question arises in this case, viz., whether two of several persons jointly interested can demand a transfer of the joint stock? No demand is alleged, or was proved to have been made, by B. Coles, the plaintiff and co-executor. [LITTLEDALE, J. There may be request by one to permit a transfer by all, for the benefit of all. Lord DENMAN, C. J. If one demands with the authority of the rest, and the defendants refuse, not because the others

(a) See also *Marsh v. Keating*, 1 New Ca. 198, 220, (27 E. C. L. R. 354.)

(b) See *Stracy v. Bank of England*, 6 Bing. 754, (19 E. C. L. R. 224.)

are absent, but upon other and different grounds, the refusal is a sufficient breach. *PATTESON, J.* Suppose trover is brought upon a demand and a refusal on a particular ground, can the defendant afterwards insist on a different ground of refusal? (a) It would be a dangerous doctrine. Besides, this point was not made at the trial.]

Platt, W. H. Watson, and Peacock, contra. There is no proof that the testatrix heard the answers given by her nephew with respect to the amount of stock, or got the dividend warrants paid to herself, or did more than merely sign her name. But supposing gross negligence to be clearly established, it is no defence to this action, nor any evidence under the present issues. It is not found that she knew of the sales; it is, therefore, impossible to presume a ratification of them by her. *Davis v. The Bank of England*, 2 Bing. 393, (9 E. C. L. R. 444,) shows that the stock is still to be treated as standing in her name, and is, therefore, now vested in her executors. That case is unimpeached by any of the later decisions, which only show that the stockholder may elect to affirm the sale, and follow the proceeds into the hands of the unauthorized vendor. The judgment was reversed on grounds independent of the merits; *The Bank of England v. Davis*, 5 B. & C. 185, (11 E. C. L. R. 196.) It is difficult to see how the mere fact of negligence or carelessness could divest the testatrix of her property without some legal conveyance or transfer. In *Pickard v. Sears*, 6 A. & E. 469, (33 E. C. L. R. 115,) the party charged with the deception was himself fully acquainted with the facts: here the testatrix was herself deceived. There are two pleas under which it is attempted to raise this defence. First, Not guilty, which merely denies that the defendants refused to transfer the stock, or to pay the dividend. Under this plea, the question of negligence is irrelevant. The cases cited on the other side, in which such proof was held admissible under this plea, were cases in which negligence was the gist of the action, and the only inquiry was, whether the injury complained of happened by the fault of the defendant, or of the plaintiff himself. Secondly, The plea denying the property. Now it is certain that the testatrix *was* once the owner of so much stock, and it is also clear that she continued possessed of it till her death, unless there was some valid transfer. The acts of parliament creating stock have provided the modes of transferring it. The transfer is to be entered and registered; the entry is to be signed by the party making the transfer, or by his attorney authorized by writing under hand and seal and duly attested; the assignee must underwrite his acceptance, and "no other method of assigning or transferring the said stock, and the annuities attending the same, or any part thereof, or any interest therein, shall be good or available in law." (b) Neither mode, pointed out by the statutes, was in truth adopted. No degree of negligence will dispense with the requisite forms. There are, indeed, cases in which negligence or acquiescence will prevent, or induce, the interference of a Court of Equity; thus the mortgagee who permits his mortgagor to hold his deeds may in equity be postponed to a subsequent encumbrancer; but the legal rights of parties, which alone this Court can look at, remain unaltered. [*PATTESON, J.* Would you contend that, if the testatrix had gone alone to

(a) See *Crowther v. Ramsbottom*, 7 T. R. 654.

(b) Stat. 18 G. 2, c. 9. s. 31. The act for consolidating the different stocks, 25 G. 2, c. 37 was also cited.

the bank, and herself demanded only the less amount, she would not have been bound by it?] The argument certainly goes to that extent. Her conduct, even if fraudulent, would have been no answer at law; or, if pleadable at all, should have been pleaded by way of estoppel. [PATTESON, J. Do you find instances of such pleas of estoppel by matter *in pais*?] (a) Such pleas are, no doubt, rare; but the pleading of a recovery in ejectment in reply to a traverse of the title in a declaration for mesne profits, *Doe v. Huddart*, 2 C. M. & R. 316; S. C. 5 Tyr. 846, (b) and the decision in *Vooght v. Winch*, 2 B. & Ald. 662, (c) show that the estoppel must be pleaded, in order to make it a bar. It can be no decisive defence upon this issue, unless gross negligence absolutely changes the property. [Lord DENMAN, C. J. It was insisted upon as conclusive evidence to the jury.] Except by way of estoppel, it cannot be conclusive. If negligence will confirm an invalid transfer, what degree of it will be sufficient? Will the acceptance of a reduced dividend on a single occasion be enough to make good the forged authority? As a ratification, it is a mere nullity; for the statute requires a power of attorney under seal to transfer stock; and a parol ratification can never be good, where an original authority cannot be given by parol. At all events, there was no ratification of the last sale, for there was no subsequent receipt of a dividend. Nor are the plaintiffs precluded by the form of declaration from recovering *pro tanto*; for the only material allegation is the possession of "a certain share or interest" in the 3 per cent. consols, and the actual amount is laid under a *videlicet*. [PATTESON, J. Should not there be a demand of the proper amount of stock, or, at least, of so much as was due generally?] The request alleged is to permit "the said share" to be transferred, and this request is not denied. Indeed the request is duly averred in both counts, and is not traversed by any plea; so that the objection made to the informality of the demand, if it had any weight in fact, is not raised on the record. Then it is objected that the action is misconceived, and should have been for transferring without authority. [Lord DENMAN, C. J. There is not much in that point. If the stock has not been legally transferred, it still remains the property of the representatives of the testatrix.] As to the argument that one of the plaintiffs, B. Coles, is the person who committed the fraud; he is necessarily joined in the action as a co-plaintiff, and sues not for his own benefit, but in his representative character.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. [After stating the pleadings, his lordship proceeded.] The facts proved on the trial were very remarkable. Benjamin Coles, the nephew of the testatrix, and in some sort her man of business, one of her executors also, and of course one of the plaintiffs, was a clerk in the Bank of England, and was in the habit of accompanying the testatrix when she received her dividends. She signed receipts both in the dividend warrants, and in the bank books. He must have paid her the full amount of dividend that would have been due if the original amount of stock had continued in her name; but he had in fact, in the interval,

(a) See *Veale v. Warner*, 1 Wms. Saund. 323. 325, and note (4) to the same case, 325 a.

(b) See also *Doe v. Wright*, post, decided in the vacation after this term.

(c) And see *Bowman v. Rostron*, 2 A. & E. 295, (29 E. C. L. R. 98,) note (b) to *Bowman v. Taylor*.

taken another woman to the bank, who personated the testatrix from time to time, and as often, forged the signature of the testatrix to several transfers of the stock, till at last a very small sum was left. The action was founded on the 18 G. 2, c. 9, creating the stock, and especially on the thirty-first section, which enacts that the stock shall be transferred by the party's signature as there prescribed, and in no other manner whatsoever; and reliance was placed on *Davis v. The Bank of England*, 2 Bing. 393, (9 E. C. L. R. 444,) where the Common Pleas, acting on that principle, allowed the plaintiff, a stockholder, to recover the amount of his stock against the bank, though there was some kind of evidence of an adoption by the plaintiff of the forgery, by which the defendants had been induced to place several purchasers on their books in lieu of the plaintiff, as holders of the same stock. That case was reversed in error on the form of two of the counts, *The Bank of England v. Davis*, 5 B. & C. 185, (11 E. C. L. R. 196;) but the general doctrine does not appear to have been impeached: indeed, it is hardly more than the language of the act of Parliament, though exceptions to it may arise out of particular circumstances. It might be added, that the statutory provision in no wise differs from the common law liability of the banker to pay the money which he keeps for his customer, when some stranger, by a forgery, has abstracted the amount from his possession.

The defence was mainly upon the general issue, and was said to be made out by the facts already recited.

The argument was, that the testatrix had, by gross negligence, brought about, or at least greatly contributed to produce the loss which has accrued; so that her representatives are precluded from complaining of the bank in respect to it. The proof of this was said to result from the facts found by the jury on questions which I submitted to them, namely, that the testatrix, though she was herself defrauded, and did not know of the diminution of her stock, yet had the means of knowing it, and was guilty of gross negligence in receiving the dividends on the reduced sums without objection; and that the bank was not guilty of any negligence in making the transfers and paying the dividends. In these particulars, the case bears a strong resemblance to *Hume v. Bolland*, Ry. & M. 371, (21 E. C. L. R. 460,) as reported in *Ryan v. Moody*, which was not mentioned in the argument here, where bankers had, in their books, credited their employers with dividends as received, and were held to be bound by their own entries, though the money had never been received by the house, but had been fraudulently obtained by one of the partners, and kept for his own use; *Best, C. J.*, asking the jury whether the plaintiffs had acted negligently, which the verdict negatived; whether the bankers had not acted with gross negligence, which the verdict affirmed.

The case of *Hume v. Bolland*, which was an issue directed by the chancellor, does not appear to have been satisfactorily decided at Nisi Prius; for the facts found on the trial were afterwards stated in a case laid before the Court of Exchequer, *Hume v. Bolland*, 1 C. & M. 130; S. C. 2 Tyrwh. 575, which held that the amount of the moneys so credited, could not be proved by the trustees as a debt against the banker's estate. But this was on the ground that the bankers had never received the money at all, and that the trustees might still recover the dividends against the bank, who had parted with them without

any authority. The question of negligence did not there appear necessary for the decision; but the doctrine, that parties, guilty of negligence which alters the rights of others, may be bound by it, was fully recognised. It was not sufficient to convert a false entry by one partner into proof that the money was received by all; yet it would, consistently with that case, protect a party sued for a wrongful refusal to do that which it had disabled him from doing.

Precisely the same doctrine was laid down by the same learned chief justice and the whole Court of Common Pleas, in *Davis v. The Bank of England*, 2 Bing. 393. 409, (9 E. C. L. R. 444,) to which the plaintiffs have recourse on this occasion: "We agree" "that if it had appeared that the bank had paid these dividends to persons to whom (if the plaintiff had informed them of the forgeries as he ought to have done)" "they could have refused to pay them, he cannot recover such dividends in this action." "But we say that it does not appear on this case" that they have so paid them: "no evidence of any such payment appears." If, then, it had appeared that, through the default of Davis, the bank had paid away his dividends, he would not have been entitled to recover. Now, in this case, the jury have, in effect, found that the testatrix's gross negligence led the bank to believe those transfers duly made, of which her executors now complain.

The facts, then, which have been found by the jury in this case, entitle the defendants to a verdict on the plea of Not guilty. They also furnish evidence on the second and third pleas, in which it is alleged that the testatrix was not a proprietor of the stock; for we are of opinion that, notwithstanding the strong words of stat. 18 G. 2, c. 9, a stockholder may so conduct himself as to be precluded from claiming in that character. For example, the transfer is made by underwriting by the parties, or, in their absence, by lawful attorneys appointed with certain formalities. But suppose the proprietor, being present, had not underwritten the transfer, but had connived at the underwriting of his name by another; or, being absent, had expressly requested another to go and sign his name, the act would not have been complied with, yet the property would have passed from the stockholder. In such a case, indeed, fraud would have been an ingredient, but we apprehend that any culpable conduct, by which the relation of the parties to the property is completely altered, will have the same effect. The verdict must be the same on the last plea also, of which the meaning is, that the defendants have been induced, by the conduct of the testatrix, to become responsible to others for that fund which they had possessed for her use, and to part with the money which they had received from government to pay her dividends.

Leave was reserved at the trial to enter a verdict for the plaintiffs, not only on those general points, but also on the refusal to transfer the sum of 115*l.*, the last remnant that the testatrix had left standing in her name. But, on looking at the admissions, we do not find that any specific demand to this effect was made; so that there could be no wrongful refusal to comply with it.

Rule discharged.

GREEN against CRESSWELL.—p. 453.

If plaintiff become bail for a stranger, in consideration of defendant's request, and of defendant promising to indemnify plaintiff against the consequences, no action lies upon such promise, unless it be in writing, under stat. 29 C. 2, c. 3, s. 4.

ASSUMPSIT. The first count of the declaration stated that, on 2d February, 1836, a *capias*, directed to the sheriff of Warwickshire, issued from the Court of Exchequer against one Joseph Hadley, at the suit of one John Reay, which was endorsed for bail for 35*l.*, and was delivered to the sheriff, who, on the day and year aforesaid, arrested Hadley; that afterwards, to wit, 9th February, 1836, in consideration that plaintiff, at the request of defendant, would become bail and surety for Hadley, and would, as such bail and surety, seal, and as his act and deed deliver to the said sheriff, a bail bond, conditioned for putting in special bail by Hadley, defendant then promised plaintiff that he, defendant, would save harmless and indemnify plaintiff from all payments, damages, costs, and expenses which he, plaintiff, should or might incur, bear, pay, sustain, or be put unto by reason or by means of so becoming bail and surety; that plaintiff, confiding, &c., did afterwards, to wit, on the day and year last aforesaid, at the request, &c., seal and deliver the bail bond, but that Hadley did not put in special bail, whereby the bond became forfeited; that afterwards, to wit, 15th February, 1836, the sheriff assigned the bail bond to Reay, who thereupon afterwards, to wit, on the day and year last aforesaid, sued the present plaintiff on the bond in the Court of Exchequer, and recovered judgment for 75*l.* 5*s.* damages and costs; and afterwards, to wit, 11th August, 1836, sued out execution by *fieri facias* against the now plaintiff, who was thereby compelled to pay 98*l.* 6*s.*: of all which, defendant had notice. Breach, that defendant had not indemnified plaintiff, nor repaid him any of the 98*l.* 6*s.*, nor divers other sums expended for costs, &c., to wit, 50*l.*, &c.

Second count on an account stated.

Pleas.—1. Non assumpsit. Issue thereon.

2. To first count, *actionem non*; because the promise in the first count mentioned was a special promise to answer for the debt and default of another person, in manner and form as in the said first count is stated and set forth; and that no agreement in respect of or relating to the promise and supposed cause of action in the said first count mentioned, or any memorandum or note thereof, wherein the consideration for the said special promise was stated or shown, was in writing, and signed by the defendant, or any person thereunto by him lawfully authorized, according to the statute, &c. Replication, that the said promise was not a special promise to answer for the debt or default of another person in manner and form, &c. Issue thereon.

On the trial, before PARK, J., at the Warwickshire Summer assizes, 1837, evidence was given of the promise, as stated in the declaration; but no evidence was given of any writing. The learned judge was of opinion that the case was not within the Statute of Frauds; and a verdict was found for the plaintiff, on the replication to the second plea. In Michaelmas term, 1837, Goulburn, Serjeant, obtained a rule for a new trial, or arrest of judgment.

Balguy now showed cause. (a) This is not a case within sect. 4 of the Statute of Frauds, stat. 29 C. 2, c. 3. The defendant is not charged "upon any special promise, to answer for the debt, default, or miscarriages of another person." When the promise was made, no debt was due from Hadley to this plaintiff, nor had Hadley committed any default or miscarriage. Nor is this action brought in consequence of any failure, on Hadley's part, to perform any thing which he was legally liable to perform. The contract of the defendant created an original liability on his own part: before the promise, no one was liable legally to do that which the defendant is now sued for not doing. The contract, therefore, which is now sued on, is altogether one between the plaintiff and the defendant. In *Thomas v. Cook*, 8 B. & C. 728, (15 E. C. L. R. 333,) the plaintiff, at defendant's request, entered into a bond jointly with him to indemnify a third party; in consideration of which the defendant promised to save the plaintiff harmless from loss by means of the bond: and it was held that an action might be brought upon this contract, though it was not in writing; *BAYLEY, J.*, saying, "a promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds." [Lord DENMAN, C. J., referred to *Thomas v. Williams*, 10 B. & C. 664, (21 E. C. L. R. 143.)]

Goulburn, Serjt. and Mellor, contra. It makes no difference whether the liability was incurred, or default committed, by Hadley before or after the promise of the defendant; *Jones v. Cooper*, 1 Cowp. 227; *Anderson v. Hayman*, 1 H. Bl. 120; *Matson v. Wharam*, 2 T. R. 80. The cases are collected in note (2) to *Forth v. Stanton*, 1 Wms. Saund. 211 a, beginning with *Read v. Nash*, 1 Wils. 305; and there the doctrine in *Matson v. Wharam*, is recognised; and in note [i] it is pointed out that *Kirkham v. Marter*, 2 B. & Ald. 613, overruled *Read v. Nash*, where it had been held that a promise to pay a party money, if he would withdraw the record in an action of assault and battery against a third person, was an original promise, and therefore not within the statute, because it did not, at the time of the promise, appear that the third party was liable: and it is shown that a promise is not taken out of the statute by being founded on a new consideration, because such a rule would, in effect, do away with the statute. The promise is to be looked to, not the consideration. The question, as there pointed out, is, whether the party, for whose debt, default, or miscarriage it is said that the defendant has promised to be answerable, be liable after the promise. Where the original liability is released, or the existing remedy abandoned, the case is not within the statute, because there is now no answering for the default of the third party; and this explains *Williams v. Leaper*, 2 Wils. 308; S. C. 3 Bur. 1886; *Castling v. Aubert*, 2 East, 325; *Edwards v. Kelly*, 6 M. & S. 204; *Goodman v. Chase*, 1 B. & Ald. 297; *Barrell v. Trussell*, 4 Taun. 117; and *Harris v. Huntbach*, 1 Bur. 373, and 2 Sel. N. P. 855, (9th ed.) And so these cases appear to be understood in *Thomas v. Williams*. Now, here, Hadley was liable to the last to protect the plaintiff from the consequences of becoming bail; *Fisher v. Fallows*, 5 Esp. 171. In *Tous-saint v. Martinnant*, 2 T. R. 104, *ASHURST, J.*, said, "There is no doubt but that wherever a person gives a security, by way of indemnity for another, and pays the money, the law raises an *assumpsit*." The

principle upon which the original liability rests is exemplified in *Exall v. Partridge*, 8 T. R. 308; *Adamson v. Jarvis*, 4 Bing. 66, (13 E. C. L. R. 343,) recognised by Lord DENMAN, C. J., in *Betts v. Gibbins*, 2 A & E. 75, (29 E. C. L. R. 29,) and the language of the Court in *Wolveridge v. Steward*, 1 C. & M. 660; S. C. 3 Tyrwh. 653, reversing the judgment of C. P. in *Steward v. Wolveridge*, 9 Bing. 61, (23 E. C. L. R. 262.) In *Thomas v. Cook*, the defendant was himself liable upon the bond, independently of the promise upon which he was sued. [PARTESON, J. It may be said that the default there was the default of the plaintiff himself in part.] The dictum of BAYLEY, J., in that case cannot be supported; and *Winckworth v. Mills*, 2 Esp. 484, is the other way. *Buckmyr v. Darnall*, 2 Ld. Raym. 1085, is strongly in favour of the defendant: the Court there treated the question as turning upon the doubt, whether or not the third party was liable; and, having determined that he was so liable, they considered the defendant's promise to be collateral, and within the statute. *Jones v. Cooper*; *Fish v. Hutchinson*, 2 Wils. 94, and *King v. Wilson*, 2 Str. 873, confirm this view.

Cur. adv. vult.

Lord DENMAN, C. J., afterwards, in this term, (June 11th,) delivered the judgment of the Court. After stating the facts, his lordship proceeded as follows.

A motion has been made in arrest of judgment, the promise appearing by the plea not to have been in writing, and the replication only averring in answer that it was not a special promise to answer for the debt or default of another.

The promise in effect is, "If you will become bail for Hadley, and Hadley, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If Hadley fails to do what is right towards you, I will do it instead of him."

If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another. The case most relied on by the plaintiff is that of *Thomas v. Cook*, where this Court held that a promise of B. to hold A. harmless against the consequences of his entering with B. and C., at B.'s request, into a joint bond to indemnify D. against debts due from C. and D. was binding, though not in writing; BAYLEY, J., and PARKE, J., the only judges present, saying that a promise to indemnify does not fall within the words or policy of the statute. But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down; which, taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but, even in that shape, we cannot see why it may not be within the words of the statute. Within the mischief of the statute it most certainly falls.

Adams v. Dansey, 6 Bing. 506, (19 E. C. L. R. 149,) does not bear out the general doctrine. That was a promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe. This is not becoming responsible for debt or default of any other, but merely promising to pay what the promisee may lose by defending the promissor's interests in a suit.

In some of the cases the language employed seems to assume that the debt, default, or miscarriage must have been incurred at the time of making the promise. But the common case of becoming responsible

for goods supplied to another on the faith of that promise, and of course after it, shows that criterion to be inadmissible.

A distinction was also hinted at, from the circumstance of Hadley's debt being due to a third person, and the default therefore incurred towards him, not towards the bail. But here again is the surmise of an intention in the legislature which none of its language bears out; and, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt, or surrendering?

There does not appear any objection to the test laid down in the note to 1 Williams's Saunders, 211 c; (a) and it is decisive in favour of the objection. The original party remained liable; and the defendant incurred no liability except from his promise.

Rule absolute for arresting the judgment.

(a) Note (2) to *Forth v. Stanton*.

CRESSWELL against WOOD.—p. 460.

Plaintiff having promised to indemnify G. against the consequences of a bail bond into which G. had entered at plaintiff's request, and G. being forced to make a payment in consequence, it was agreed between plaintiff and defendant that plaintiff should obtain the money by discounting a bill drawn by plaintiff and accepted by defendant.

Plaintiff sued defendant on the bill; and defendant pleaded that it was accepted for plaintiff's accommodation.

Held, that a jury might find for defendant on this issue, although plaintiff was not liable on his promise to indemnify, it not being in writing.

ASSUMPSIT on a bill of exchange for 28*l.*, drawn by plaintiff on, and accepted by, defendant, and for interest, and on an account stated.

Pleas:—1. To first count, that defendant did not accept. Issue thereon.

2. To first count, that the bill of exchange was accepted by the defendant at the request of the plaintiff, and merely for the accommodation of the plaintiff; and that there never was any other consideration whatever for the defendant's so accepting the said bill as in the declaration mentioned, or for the defendant's paying the amount thereof, or any part thereof. Replication, *de injuriâ*.

3. To second and third counts, *Non assumpsit*. Issue thereon.

On the trial before PARK, J., at the Warwickshire Spring assizes, 1838, it appeared, by evidence on the part of the plaintiff, that in March, 1836, a person named Green, who was son-in-law of the defendant, applied to the plaintiff, who was an attorney, to set aside a judgment obtained against him. Green, on a bail bond given by him in a suit of *Reay v. Hadley*: that the plaintiff obtained a stay of proceedings, on payment of costs by Green, amounting to 28*l.*: that afterwards the plaintiff's London agent wrote to the plaintiff, informing him that, unless the 28*l.* was forthwith sent to London, execution would issue against Green; that information of this was immediately given by the plaintiff to the defendant, Green's father-in-law, and that it was agreed between them that the plaintiff should obtain the money by discounting a bill which the defendant should accept; that this was done; and that the present action was brought on the bill so accepted. The plaintiff also gave evidence of conduct on the part of the defendant, which, as

contended, showed a recognition of his liability upon the bill. The defendant gave evidence to show that Green had become bail for Hadley at plaintiff's request, and upon his promise to indemnify Green; so that the 28^l. was really advanced upon plaintiff's own account. Green was called as a witness for the defendant, and, upon cross-examination, admitted that he had, upon the proceedings to set aside the judgment on the bail bond, made an affidavit which contained statements at variance with his present testimony, but of the contents of which he said that he was not fully cognisant at the time that he made it. For the plaintiff it was contended that, even upon the facts set up by the defendant, the bill could not be drawn for the plaintiff's accommodation, since the promise to indemnify was not binding, as it did not appear to have been made in writing. (a) The learned judge told the jury that, if they thought the plaintiff had indemnified Green, they might find that the bill was drawn for the plaintiff's accommodation. Verdict for defendant on the second plea, and on the pleas to the second and third counts. In Easter term, 1838, *Goulburn*, Serjt., obtained a rule for a new trial, on the ground of misdirection, and upon the evidence; and it was ordered that the rule should come on for argument with that in *Green v. Cresswell*, ante, p. 458, then standing in the new trial paper.

Balguy now showed cause, (b) and *Goulburn*, Serjt., and *Mellor* were heard in support of the rule. The nature of the arguments will appear from the judgment.

Cur. adv. vult.

Lord DENMAN, C. J., afterwards, in this term, (June 4th,) delivered the judgment of the Court. After stating the pleadings, his lordship proceeded as follows.

The evidence was direct to show that the plaintiff had persuaded Green, the defendant's son-in-law, to become bail for one Hadley, or a promise to indemnify him against all consequences; and that the bill was drawn in order to enable Cresswell to meet the demand when made. The plaintiff, on the other hand, said that he was not liable on his promise, because it was void for want of writing; but this is an inconclusive argument. He was bound, in honour and conscience, to keep his promise, whether written or unwritten, and might not be aware, when this bill was given, of the advantage offered to him by the statute. The bill might have been accepted for his accommodation, that is, at his request, without any consideration, for the purpose of meeting a claim which might not be capable of enforcement at law.

The plaintiff also proved many things said and done by defendant, which showed that he thought himself liable to pay this acceptance; but this argument is open to a similar answer. He might not be aware of the defence afforded against an action brought on his own acceptance, by its having been given for the drawer's accommodation.

The learned judge appears to have taken up the cause strongly in behalf of the defendant, at which we cannot wonder, when we consider what the transaction was. Green was called as a witness by the defendant; and the plaintiff contradicted him by his own affidavit. He swore that he was not aware of what he was required to swear; and the affidavit was drawn up by Cresswell, though sworn to by Green.

(a) Reay having afterwards recovered judgment against Green, Green sued the present plaintiff on his promise to indemnify; and this Court held that, as the promise was not in writing, the action could not be maintained: *Green v. Cresswell*, ante, p. 142.

(b) Before Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

The judge said that the affidavit made no difference in the case; nor did it, if that fact was true. He exposed himself to just censure, if he deposed upon oath to any thing he did not fully understand; but the jury were to consider of the explanation; and they must have been satisfied with it.

On the whole, we do not think this verdict ought to be disturbed.

Rule discharged.

GARDNER and Others, Assignees of STRUTTON, a Bankrupt, against MOULT and Three Others, Public registered Officers of the Northern and Central Bank of ENGLAND.—p. 464.

Where a petitioning creditor, having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat; Held, that the deposition, then made, was evidence of the act of bankruptcy as against such creditor, in an action against him by the assignees, in which the act of bankruptcy was put in issue.

ASSUMPSIT for money had and received for the use of plaintiffs, as assignees of Strutton. Account stated.

Pleas. 1. That Strutton did not commit any act of bankruptcy before the issuing of the fiat in bankruptcy against him. 2. Non assumpsit. 3. That, before the issuing of the fiat, the sum mentioned in the first count was bona fide, and not by way of fraudulent preference, paid by Strutton to the copartnership on account of a larger sum in which he was then indebted to the copartnership for money lent to, and paid, laid out and expended, by the copartnership for, him at his request, &c.; and that the copartnership had not, before or at the time of such payment, notice of any act of bankruptcy committed by Strutton. Verification. 4. That the payments were made to the bank on a current banking account between Strutton and the Bank; that advances had since been made to him by the Bank on the credit of such payments; and that, at the times when such payments were made by Strutton, and the advances were made to him by the bank, the copartnership had no notice of any act of bankruptcy. Verification. 5. Plea of mutual credit, with a similar averment of no notice of any act of bankruptcy.

Replication to 1st plea, that Strutton did commit an act of bankruptcy before the issuing of the fiat. To the 3d, 4th, and 5th pleas, that the copartnership had, before and at the respective times of payment, &c., notice of an act of bankruptcy. Defendants gave notice, before trial, at their intention to dispute the act of bankruptcy, or that Strutton had committed any before or at the time of issuing the fiat.

At the trial, before COLTMAN, J., at the Liverpool Summer assizes, 1837, the only evidence of the act of bankruptcy offered by the plaintiffs was a deposition made by one D. Hay, the manager of a branch establishment of the same banking copartnership at Chester. The directors of the bank had struck a docket against Strutton, upon which the fiat issued; and their solicitor, upon discovering that Hay was able to prove an act of bankruptcy, sent him to Manchester, where a fiat was opened upon a deposition made by him, showing that Strutton had absented and secreted himself with intent to defeat his creditors on certain occasions, and at certain times, therein specified. Hay was not a shareholder; nor had he any connexion with the bank but as manager.

The evidence was objected to as inadmissible, especially as issue was

joined on the act of bankruptcy, and a notice was given to dispute it. The learned Judge admitted it. Verdict for plaintiffs.

In the following Michaelmas term Sir *F. Pollock* obtained a rule nisi to enter a nonsuit, or for a new trial.

Cresswell and *Alexander* now showed cause. An affidavit used by a party is always admissible against him. This is an affidavit by an officer of the company, made by their direction, in support of their own proceeding, and used by their solicitor. It is therefore evidence against the defendants as much as if it had been a statement by the defendants themselves: *Brickell v. Hulse*, 7 A. & E. 454, (34 E. C. L. R.) Besides, the bank directors, having themselves struck the docket and obtained the fiat, are not in a condition to dispute the bankruptcy. Thus, the petitioning creditor cannot show that the debt was insufficient to support the commission; *Harmar v. Davis*, 7 Taunt. 577, (2 E. C. L. R. :) or dispute the bankruptcy; *Ledbetter v. Salt*, 4 Bing. 623, (13, 15 E. C. L. R.) So admissions by a defendant of the plaintiffs' character will dispense with strict proof of their title as assignees, even where their title is distinctly put in issue, and there is a notice of an intention to dispute it; *Inglis v. Spence*, 1 C. M. & R. 432, S. C. 5 Tyrwh. 8. Where trespass was brought by a bankrupt to try the validity of the commission, evidence of his having applied to this Court to be discharged from custody on the ground that he was a bankrupt and that the defendant, at whose suit he was in custody, had proved his debt, was held conclusive against the plaintiff: *Watson v. Wace*, 5 B. & C. 153, (11 E. C. L. R.) Hay was not a mere witness for the bank, but was identified with them for the purposes of the affidavit and fiat.

Sir *F. Pollock*, *Wightman*, and *Cowling*, contra. The doctrine, that they who take out a fiat shall not deny the bankruptcy, is not disputed. The question here was, not merely whether Strutton was a bankrupt, but whether an act of bankruptcy had been committed by him at a certain time. The date was material, because the payments sought to be recovered were alleged to have been made after notice of the bankruptcy. There is no rule of evidence that a party shall be affected by an affidavit made on his behalf. It might as well be contended that the testimony of a witness at *Nisi Prius* is admissible evidence, on any future occasion, against the party who called him.

In *Chambers v. Bernasconi*, 1 C. M. & R. 347, S. C. 4 Tyrwh. 531, where the act of bankruptcy was in issue, and the place was material, the Court decided that depositions of deceased witnesses, taken before the commissioners on the opening of the commission and enrolled by the assignees, were not evidence against the latter. In *Atkins v. Humphreys*, 1 M. & R. 523, the plaintiff was not permitted to put in evidence a deposition, made by a witness in a suit in Chancery between the defendant and a third party and used by the defendant on that occasion, for the purpose of proving a fact mentioned in such deposition. In *Brickell v. Hulse*, a distinction was taken between a deposition in equity (which this resembles) and an affidavit. There might have been two depositions taken in proof of the bankruptcy, and they might have been contradictory: which of them would then be evidence? Hay was neither director nor shareholder, but a mere witness tendered by the bank and examined orally, whose testimony was taken down by the proper authority. No more use was made by the defendants of his statements, than was made of the depositions which were held inadmissible in *Chambers v. Bernasconi*.

LORD DENMAN, C. J. The examination or deposition of Hay was clearly admissible evidence. The defendants send their servant to prove an act of bankruptcy; and they act on the statement made by him. There is no necessity for entering into the general doctrine. No doubt a party in a cause is not bound by all that his witnesses say at Nisi Prius, or in their depositions in Chancery. But the defendants are here bound by the particular statement which their agent was sent to make.

LITTLEDALE, J. The deposition is evidence as much as if it had been made by the defendants themselves. They sent him for the purpose of making it, and they adopted it.

PATTERSON, J. The distinction pointed out in *Brickell v. Hulse* is a sound one, and I do not intend to depart from it; but it is not material by what name the document is called. It is in substance an affidavit within the meaning of the distinction there laid down, though called a deposition. Hay therein makes a statement of facts, which the petitioning creditors had previously ascertained from him that he was able to make. He says nothing but what they knew he would say, and was subject to no cross-examination. *Chambers v. Bernasconi* is not in point. The depositions were there offered against the assignees, and not, as here, against the petitioning creditor.

WILLIAMS, J. The solicitor of the defendants is employed by them to obtain evidence of a certain fact in order to support a fiat. For that purpose he produces the deponent, who swears to the specific fact which he was expressly called to prove. Under such circumstances, the affidavit is like one made by the principal, and admissible by the same rule. The question, too, is not *what* it proves, but whether, upon this record, it was admissible at all.

Rule discharged.

TREWHITT against LAMBERT.—p. 470.

A witness produced to prove a parol demise from plaintiff to defendant, stated that, at the time of making it, plaintiff looked at written minutes, from which he appeared to read the terms, to which defendant assented. Held that, in the absence of any further proof respecting the nature of the minutes, parol evidence of the terms of the demise was admissible.

ASSUMPSIT on an agreement for repairing premises, whereof defendant was tenant to the plaintiff. Plea, non assumpsit. At the trial before COLERIDGE, J., at the sittings at Westminster, in this term, a clerk of the plaintiff was called to prove the agreement. The witness had been present at the making of the agreement; upon which occasion the plaintiff read to the defendant the terms of the agreement from some writing held in his hand at the time. It was not proved what the writing was; nor was it shown to defendant, or signed by him. The defendant assented to the terms: and shortly afterwards the witness wrote down the terms in a book, which he produced in Court, and by which he refreshed his memory after trial. It was objected, on the part of the defendant, that the writing ought to be produced. The learned judge overruled the objection; and the jury found for the plaintiff. In this term (a)

Ball moved for a new trial, on the ground that the agreement was in writing, and that parol evidence of it was therefore inadmissible. He distinguished *Doe dem. Bingham v. Cartwright*, 3 B. & Ald. 326, (5 E. L. C. R. 306,) from the present case, by the circumstance that the

(a) May 31st. Before Lord Denman, C. J., Littledale, Patterson, and Williams, Js.

memorandum must here have contained the terms, not of a mere proposal, but of an accepted agreement. *Rex v. Wrangle*, 2 A. & E. 514, (29 E. C. L. R. 160,) was also referred to.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was a motion for a new trial on account of the admission of parol evidence of a lease, which in fact was written. The fact was, that the plaintiff had taken down in pencil writing some minutes of the letting, and read them over to the defendant, who agreed to them. They were afterwards entered in a book by the witness, who, having been present at the discourse, refreshed his memory by the book. It was said that the original minutes ought to have been produced. But there was no proof what these minutes were: the plaintiff had never said that they constituted the lease: it was proved only that the plaintiff looked upon a paper, and appeared to call over from it the terms of the intended lease. It might have been all in ciphers and shorthand for his own use, in no legible form. There was nothing shown to have ever existed that would have conveyed any information to the Court or jury.

Rule refused.

SANDYS against HODGSON.—p. 472.

Defendant brought trover against D. for a dog, and obtained a verdict for 50*l.* damages, subject to be reduced to 1*s.* on the delivery of the dog to defendant. By plaintiff's authority D. delivered the dog to defendant, at the same time demanding it back on behalf of plaintiff, as his property at a time named. Afterwards, at the time named, plaintiff demanded the dog, and defendant refused to deliver it.

Plaintiff brought trover; defendant traversed plaintiff's property, and also pleaded Not guilty, and Leave and license. Plaintiff new assigned to the plea of Leave and license; to which defendant pleaded Not guilty, and Leave and license; to which last plea plaintiff replied *de injuria*.

Held, that plaintiff was not precluded from proving his title by having authorized the delivery; and that, on proof of title, he was entitled to a verdict on all the above issues.

TROVER for a dog.

Pleas: 1. That the dog was not the property of the plaintiff. 2. Not guilty. 3. That the defendant converted by the leave and license of the plaintiff.

The replication joined issue on the first and second pleas, and, as to the third, new assigned a fresh conversion.

To the new assignment the plaintiff pleaded, 1st, Not guilty; 2d, Leave and license.

On the first of these pleas the plaintiff joined issue, and to the second replied *de injuria*.

On the trial, before COLTMAN, J., at the Summer Lancaster assizes, 1837, the following facts appeared. At the Lancaster Spring assizes 1837, the defendant brought two actions of trover for the same dog, which was the subject of the present action, one against a person named Dowbiggen, the other against the present plaintiff. The defendants in each of these actions traversed Hodgson's property. *Hodgson v. Dowbiggen* was tried first, and a verdict given for the then plaintiff Hodgson, damages 50*l.*, to be reduced to 1*s.*, if the dog should be delivered up to Hodgson before the fourth day of the following term.

Afterwards *Hodgson v. Sandys* was tried; but, Sandys calling Dowbiggen as a witness, a verdict was found for the defendant on the plea denying Hodgson's property. Before the day named for the delivery of the dog, Dowbiggen, and the attorney who had conducted the defence in each cause, brought the dog (with a shilling) to Hodgson, and offered it to him, giving him at the same time a written notice demanding the dog as Sandys's property, and on his behalf, and stating that they should call for it at a time named. Hodgson received the dog; and the attorney called for it at the time appointed, and demanded it; but Hodgson refused to give it up. On the trial of the present action the plaintiff gave evidence of his title to the dog, and produced the record of the former action of *Hodgson v. Sandys*; and the defendant produced the record of *Hodgson v. Dowbiggen*; and it was shown that Dowbiggen and the attorney had acted by the plaintiff's authority. For the defendant it was contended that the plaintiff had precluded himself from setting up his title in this action; and that no conversion was proved which was not justified by the leave and license first pleaded and admitted by the plaintiff. Verdict for plaintiff, with leave for the defendant to move for a nonsuit.

In Michaelmas term, 1837, *Joseph Addison* obtained a rule for a new trial or a nonsuit. (a)

Cresswell and *Alexander* now showed cause. First, there is no ground for arguing that the evidence of conversion, furnished by the refusal of the defendant to redeliver the dog, is met by what took place before. Independently of the plaintiff's consent, the fact is simply that Dowbiggen gave up to the defendant possession of that which belonged to the plaintiff. So far, therefore, the defendant gained no title except as against Dowbiggen; and the plaintiff was entitled to sue. Then, as to the plaintiff's conduct, there is nothing to divest him of his title. There is no estoppel by record; and, as to the plaintiff's consent, he merely allows Dowbiggen to satisfy the condition of the former verdict, by giving up, as between Dowbiggen and the defendant, the possession, which, as between those two, Dowbiggen was not entitled to retain. But this was not, either in form or fact, an abandonment of the plaintiff's right to assert his title against the defendant. If the defendant was not satisfied with the delivery on these terms, of which he was cognisant from the written notice, he should have refused to receive the dog.

Secondly, there is nothing in this record to vary the above view. The conversion by leave and license took place when possession of the dog was delivered by Dowbiggen to the defendant. Taking property of another, by assignment, from a party who has no authority to dispose of it, is a conversion; *McCombie v. Davies*, 6 East, 538. That took place here by leave and license, which justifies the conversion, but does not prevent the transaction from being a conversion. If the defendant meant to contend that it did, he should have taken issue on the conversion, and have given the leave and license in evidence. Then, afterwards, by the defendant's refusal to redeliver, the conversion took place which is now assigned. This satisfies the rule laid down in note (6) to *Greene v. Jones*, 1 Wm. Saund. 299 a, that two trespasses must be proved where there is a new assignment.

Joseph Addison and *W. H. Watson*, contra. The plaintiff first treats

(a) Also for reduction of damages; but on this there was no decision.

the defendant as the owner of the dog, and then claims it as his own. [PATTESON, J. He treats the defendant as entitled to the possession as between the two, Dowbiggen and the defendant. Why is that inconsistent with claiming the property as against the defendant? If a party comes in to defend an ejectment, and is personally estopped as against the plaintiff, and a verdict passes for plaintiff, the tenant in possession may give up possession, and then sue the lessor of the plaintiff.] Here the plaintiff has been a party to a fraudulent delivery, for the purpose of defeating the defendant's claim. The Court will not allow him now to avail himself of the title which he has fraudulently held back: 3 Bac. Abr. 774, &c. (7th ed.), *Fraud*, (B;) *Clare v. The Earl of Bedford*, cited in *Hunsden v. Cheyney*, 2 Vern. 151; *Cockshott v. Bennett*, 2 T. R. 763; *Leicester v. Rose*, 4 East, 372; *Jackson v. Duchaire*, 3 T. R. 551; *Goodale v. Wyat*, Poph. 99. In Co. Lit. 357 b, it is said, "So it is in all cases where a man hath a rightful and just cause of action; yet if he of covin and consent do raise up a tenant by wrong against whom he may recover, the covin doth suffocate the right, so as the recovery, though it be upon a good title, shall not bind or restore the demandant to his right." [Lord DENMAN, C. J. What does the fraud consist in? In allowing the defendant to take the dog, or in getting the damages reduced?] In giving a delusive possession, the defendant being entitled, either to the full damages, or to a *bonâ fide* surrender of the property. It is an acknowledged principle, that a party, who aids a transaction in which a state of facts is taken for granted on all sides, shall not afterwards be allowed to deny those facts, however the truth may be: *Pickard v. Sears*, 6 A. & E. 469, (33 E. C. L. R. 115.) (a)

Then, as to the new assignment, no second conversion was proved. The dog being delivered up to the defendant by the plaintiff's consent, there was no conversion in afterwards refusing to redeliver.

Cur. adv. vult.

Lord DENMAN, C. J., afterwards, in this term, (June 11th,) delivered the judgment of the Court. After stating the facts, his lordship proceeded as follows.

On the trial it was contended that Sandys's conduct precluded him from setting up any claim of property in the dog, as it plainly led Hodgson to believe it his (Hodgson's) property. And recourse was had to the principle lately expounded in *Pickard v. Sears*, which runs through many cases in equity, and is thus stated by Sugden, 3 Vend. & Purch. 428, 10th ed.:—"If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right."

But we cannot apply that doctrine to the case before us; because we do not perceive how Sandys induced Hodgson to become the purchaser of the dog. For, in the first place, he did not become the purchaser, but only established a right of action against Dowbiggen as a wrongdoer; and, secondly, Sandys cannot be said to have persuaded him that he admitted his title, having himself so lately claimed to hold the dog against him.

If, indeed, it had been proved that Hodgson was induced by Sandys's conduct to enter into a disadvantageous compromise of the action, there might have been some difference. But we do not know that it was such. Hodgson may have entitled himself to recover the dog against

(a) See *Gregg v. Wells*, *antè*, p. 90.

Dowbiggen; and it would then be just to enter a verdict for what may be the whole amount of the damages laid in the declaration, called penal damages, to compel restitution: but the fact of conversion may have entitled Hodgson to no more damages than the 1s. actually paid. And this arrangement between them, as far as appears, was wholly independent of the question of property as between Sandys and Hodgson. For, though Sandys may have claimed through Dowbiggen, there is no inconsistency in supposing that Dowbiggen was in such a position towards Hodgson as to have no defence against him, and yet that Sandys was entitled as owner to recover it from Hodgson.

Rule discharged.

JACKSON against HILL.—p. 477.

In an action against the bailiff of the liberty of P. in the county of Y. for the escape of a prisoner in execution, the declaration alleged a mandate by the sheriff of Y. to the defendant "as chief bailiff of the liberty of P., or his deputy," to take W. T., if found in his liberty, &c. The instrument produced in proof of the averment was in the form of a common sheriff's warrant, and was addressed by the sheriff to the keeper of the county jail, "the chief bailiff of P., his deputies, and J. D., my bailiffs," and commanded them, jointly and severally, to take W. T., if found "*in my bailiwick*," &c., "that I may have the bodies," &c. The deputy of the defendant thereupon arrested and conveyed W. T. to the county jail out of the liberty:

Held, that the averment was not proved; for that the precept was not a mandate to defendant as bailiff of a liberty, but a warrant to him as sheriff's bailiff, and acted upon as such; though it was shown that defendant, when ruled by plaintiff to return "the mandate," had obtained time to do so, and had not then set it up as a common warrant.

Per PATTERSON, J. A bailiff of a liberty, when addressed in the mandate as the sheriff's bailiff, may waive his franchise and act upon it in the latter character.

In such an action the plaintiff is not estopped by the sheriff's return of *cepi corpus* to the writ of *ca. sa.*

DEBT for an escape. The declaration, after averring that the liberty of Pickering Lythe, in the county of York, is an ancient liberty with return of writs, and that defendant, at the several times when, &c., was chief bailiff thereof, recited a judgment in the Court of King's Bench recovered by plaintiff against W. Taylor and W. Taylor the younger, for 98*l.* debt and costs. That plaintiff thereupon sued out a *ca. sa.* directed to the sheriff of Yorkshire, and duly endorsed and delivered it to him. That the sheriff thereupon, by his mandate duly made in writing under his hand and seal of office, and directed to defendant, as chief bailiff of the said liberty, or his deputy, required him to take the said W. T. and W. T. jun., if they should be found in his liberty, and them safely keep, so that he (the sheriff) might have their bodies, &c.; which mandate was delivered to defendant to be executed in due form of law. That defendant, by virtue of such writ and mandate, as chief bailiff, &c., took and arrested the said W. T. and W. T. jun. within the liberty, and then, by virtue of the said writ and mandate, kept and detained them in his custody in execution at the suit of plaintiff from thence until defendant, being such chief bailiff, afterwards, to wit, on, &c., without the leave or license and against the will of the plaintiff, suffered and permitted them to escape out of his custody; and the said W. T. and W. T. jun. did escape and go at large wheresoever they would, and out of the said liberty, the plaintiff then and still being unsatisfied. Whereby an action hath accrued, &c.

Pleas: 1. That the liberty of Pickering Lythe is not an ancient liberty with return of writs, in manner and form, &c. 2. That the sheriff did

not by his mandate in writing, &c., directed to defendant as chief bailiff of the said liberty, or his deputy, require defendant to take the said W. T. and W. T. jun., &c., in manner and form, &c. 3. That the mandate was not delivered to defendant to be executed, &c., in manner and form, &c. 4. That defendant did not, by virtue of the said writ and mandate, take or arrest W. T. jun., in manner and form, &c. 5. That W. T. and W. T. jun. did not escape or go out of the custody of defendant, or go at large, in manner and form, &c. 6. That there is not, nor ever was, within the said liberty any jail for the custody of prisoners arrested within the liberty by virtue of any mandate directed to the chief bailiff by the sheriff of Yorkshire, and that from time immemorial the chief bailiff has been used to convey all prisoners so arrested to the castle of York, out of the liberty, and there deliver them to the custody of the sheriff, and the sheriff has been used to keep all prisoners so delivered. That defendant, having arrested the Taylors under the writ and mandate, conveyed them by the nearest and most convenient way out of the liberty, in and through the county of York and the county of the city of York, to the said castle, and then delivered them to the said sheriff, &c.; and that the said conveyance out of the liberty is the same escape whereof the plaintiff has complained. Verification. 7. That plaintiff ought not *further* to be admitted or received to plead the said declaration by him above pleaded, as to so much thereof wherein plaintiff alleges that, by virtue of the writ and mandate in the declaration mentioned, defendant, as chief bailiff of the liberty of Pickering Lythe, took and arrested the said W. T. and W. T. the younger, and then, by virtue of the said writ and mandate, kept and detained them in his custody in execution at the suit of plaintiff, because he says that, after the commencement of this suit, and before the day of pleading this plea, at the return of the said writ, to wit, on the 11th June, 1836, the said sheriff duly returned the said writ in the declaration mentioned to the Court of our said lord the king at Westminster, and then and there returned thereon that by virtue thereof he, the said sheriff, had taken the said W. T. and W. T. the younger, whose bodies he had ready at the time and place in the said writ contained, as by the said writ he was commanded, as by the record of the said writ and of the return thereof remaining, &c. more fully appears. Verification by the record, and prayer of judgment if the plaintiff ought further to be admitted or received, &c., (as in the introductory part of the plea.) 8. That defendant, as chief bailiff of the said liberty, had not the execution and return of all writs to be executed within the limits of the liberty, &c.

Replications.—As to the first, second, third, fourth, fifth, and eighth pleas, similiter: issue joined.—As to the sixth plea, that there was a jail within the liberty which had become dilapidated and in decay, and that the chief bailiff was bound to keep all such prisoners in safe custody within his liberty; with a special traverse of the immemorial usage stated in the plea, &c.: conclusion to the country: issue thereon. As to the seventh plea, demurrer, alleging for causes that the plea neither traversed, nor confessed and avoided, the matter in the declaration; that the matter pleaded as an estoppel could not be set up as such to the taking and arrest, or the cause of action mentioned in the declaration; that, the cause of action being against defendant for an escape, the plaintiff's being estopped from alleging that defendant took and arrested the Taylors could not constitute any answer; that the plea was

an argumentative traverse, and bad for repugnancy, because, if defendant was guilty of an escape, (which the plea admits,) he must have arrested the Taylors; that the sheriff's return, admitting it to be conclusive, cannot alter the liabilities of the parties at the commencement of the action; and that the plea alleged a return by the sheriff at the return day of the writ, whereas there is no return day in the said writ. Joinder.

The trial of the issues came on at the York Summer assizes, 1837, before PARKE, B., when a verdict was found for the plaintiff on the first and eighth pleas; and for the defendant on the second, third, fourth, and fifth pleas, subject to the opinion of this Court on the question, whether a certain document put in evidence, answered the description of a mandate by the sheriff to the defendant, as stated in the declaration. The jury were discharged from finding a verdict upon the issue on the sixth plea.

The writ of *ca. sa.*, issued to the sheriff, contained no clause of non omittas. Upon receipt of it, the sheriff sent to the defendant by post, the following document under his seal of office, addressed to "The chief bailiff of Pickering Lythe."

"Yorkshire, to wit. N. E. Yarburch, Esq., sheriff of the county aforesaid, to the keeper of the jail of the said county, and also to the chief bailiff of the liberty of Pickering Lythe, his deputies, and Job Doe, my bailiffs, greeting. By virtue of a writ of our sovereign lord the king to me directed, I command you and every of you jointly and severally that you take, or one of you take, William Taylor and William Taylor the younger, if they shall be found in my bailiwick, and them safely keep, so that I may have their bodies before our sovereign lord the king at Westminster, immediately after the execution hereof, to satisfy David Jackson, as well a certain debt of 54*l.*, which he lately in the King's Court, before the king at Westminster, recovered against the said William Taylor and William Taylor the younger, as also 44*l.*, which, in the said Court, were awarded to the said David Jackson, for his damages which he had sustained, as well on occasion of the detention of the said debt, as for his costs and charges by him about his suit in that behalf laid out, whereof the said W. Taylor and W. Taylor the younger are convicted. Hereof fail not, as you will answer at your peril. Given under the seal of my office, the 16th April, 1836."

"By the sheriff." (L. s.)

"You are hereby required not to discharge the defendant without order from the said sheriff."

There was also a memorandum upon the above, of the description and residence of the Taylors, the sum to be taken under the writ, and the name and address of the plaintiff's attorney, as endorsed on the *ca. sa.*

The arrest was made by the deputy of the chief bailiff, who conveyed the prisoners to the county jail at York, out of the liberty. The plaintiff had, since the commencement of this action for an escape, ruled the sheriff to return the writ; and also the defendant, the chief bailiff, to return the sheriff's mandate to him. Both had obtained further time to make their returns. The sheriff afterwards returned *cepi*, &c.; and the chief bailiff (the now defendant) thereupon applied to this Court to discharge the rule obtained against himself; which was accordingly done. (a)

(a) See *Jackson v. Taylor*, 5 Dowl. P. C. 140.

On the following Michaelmas term, *Atcherley*, Serjt., moved to enter a verdict for the plaintiff instead of the defendant, on the point reserved at the trial.

Cresswell and *Wightman* now showed cause. This is no mandate to the defendant as bailiff of a liberty, but a mere warrant by the sheriff to the defendant as *his* bailiff, to arrest the Taylors within the sheriff's bailiwick. Under this warrant the defendant might have arrested anywhere in the county. As bailiff of a liberty, he could have arrested only within the liberty. It directs the defendant to keep the prisoners "so that *I* may have their bodies;" whereas, the ordinary mandate to the bailiff of a liberty is, to take "that *you* may have his body," &c.; Ritson's Office of Bailiff of a Liberty, p. 76, (Appendix.) The fact, that the defendant is addressed as "chief bailiff of the liberty," is immaterial, and mere description. It is not a mandate to him *as such*. This distinction is like that between a writ against a defendant *as* administrator, and one only describing him so. It is said that an arrest by the sheriff's bailiff within the liberty would be unlawful, and that the defendant must therefore be presumed to have acted legally in his character of bailiff of the liberty. The answer is, that the liberty is within the sheriff's bailiwick, and that the arrest by him within the franchise is good, though it may expose him to an action at the suit of the lord of the liberty; *Villa de Darby v. Foxley*; 1 Rol. Rep. 119. Nor is the arrest objectionable even on that ground, if the lord, or his bailiff, waive his franchise by consenting to arrest under the warrant of the sheriff as his bailiff. That the franchise may be waived, appears from *Munday v. Frogat*, 3 Keb. 71. 117. 125, where the bailiff of the liberty of the High Peak took a bail bond in the sheriff's name, which was held good, the bailiff having thereby waived his franchise, and there being no jail in the liberty. There is an *Anonymous* case in March, March's Reports or New Cases, ed. 1675, p. 25, which also shows that the sheriff may address his warrant to the bailiff of a liberty as "his bailiff." Indeed, the bailiff of a franchise is no more than a special bailiff of the sheriff, and was so considered by Lord ELLENBOROUGH, C. J., in *Grant v. Bagge*, 3 East, 128. (a) [PATTESON, J. The instrument is addressed to the chief bailiff and "his deputies;" now, the sheriff's bailiff cannot make a deputy; it may, therefore, be argued that the sheriff must have meant to treat the defendant as the officer of the franchise, and not as his own bailiff.] No such inference would be legitimate; for it is also addressed to the keeper of the county jail, who could not, as such, arrest at all. Then it is said that the bailiff, when ruled to return the mandate, applied for time, and thereby admitted the nature of it, and his liability to make a return to it, as such mandate. But this is no estoppel; or, if it is, it may be argued that the plaintiff has equally estopped himself by treating the arrest as one made by the sheriff, and compelling him to return *cepi corpus*, by which it, at all events, appears that the sheriff considered the arrest to have been made by himself, and in his own bailiwick. The precept cannot be both warrant and mandate; it must be one or the other, and, upon the whole, it must be taken to be the former. *Boothman v. The Earl of Surrey*, 2 T. R. 5, is the case that has probably induced the plaintiff to try this experiment: but there it appeared that there was a jail within the liberty; the precept was directed to the chief bailiff and his deputies

(a) See *ib.* p. 140.

only; and the sheriff clearly treated him as such throughout the proceedings. (a) [PATTESON, J., referred to the note in Ritson's Office of Bailiff of a Liberty, p. 14, which mentions the practice of directing the sheriff's warrant as well to the bailiff of the liberty, as to one or more of his own bailiffs, and thereby avoiding the necessity of a non omittas clause.]

Atcherley, Serjt., Knowles, and W. H. Watson, contra. The instrument is a mandate, and pursues the usual form of such mandates. [Copies of several mandates by sheriffs to the bailiffs of this and other liberties were produced from the files of this Court; but the Court observed that none of the bailiffs were addressed by the sheriff as "my bailiffs."] It is addressed to the chief bailiff, as such. It names "his deputies," which would be improper if it were the case of a common bailiff, who cannot have a deputy, but only an assistant. If the deputy of the chief bailiff be intended, then the arrest, which, in fact, was made by the deputy, was regular. [PATTESON, J. The defendant may say that the warrant makes all his deputies to be also the sheriff's bailiffs for this purpose.] A general address of that kind is not enough. The name of the bailiff should be mentioned in the warrant. *Housin v. Barrow*, 6 T. R. 122, shows the necessity of this, where a warrant to M. "and all the others of the sheriff's officers" was adjudged bad. [LITLEDAL, J. There may be known deputies within the franchise; and the sheriff may make them his bailiffs without further describing them.] The presumption, as against the defendant, is that he acted as officer of the liberty; for in that character he applied to this Court, and obtained time to make his return. [PATTESON, J. He seems to have treated it as a warrant; for he hands the prisoner over to the county jail.] There was an issue on a custom to do this, and on the existence of a local jail. It cannot be presumed that the sheriff would direct his own bailiff to disturb the defendant's franchise, or direct the defendant's deputies to do so, by an act which would entitle the sheriff to the fees.

(a) A copy of the form of mandate used in *Boothman v. The Earl of Surrey*, was produced at the desire of the Court. It was as follows: "Yorkshire, to wit. Sir Thomas Turner Slingsby, Bart., sheriff of the said county, to the chief bailiff of the liberty of Hallamshire, and his deputies, greeting. Whereas, his majesty lately commanded the sheriff of Yorkshire that he should cause to be levied of the goods and chattels in his bailiwick, of John Woolhouse, otherwise Wollas, 37*l.*, which in his said majesty's Court before his said majesty at Westminster were awarded to Sarah Boothman for her damages, which she sustained by reason of not performing certain promises and undertakings made by the said John to the said Sarah at Leeds in my county, and that he should have that money before his said majesty at Westminster at a certain day now past, to render to the said Sarah for her said damages, whereof the said John was convicted, as appeared to his said majesty on record, and the said sheriff on that day returned to his said majesty that, for the execution of the said writ to him directed, he commanded the chief bailiff of the liberty of Hallamshire in his county, who had the full execution of all writs, precepts, and process to be executed in that liberty and the return thereof, and to whom the execution of the said writ wholly belonged, inasmuch as he could not execute the same in his county out of the said liberty, which said chief bailiff, to wit, The Right Honourable Charles Howard, commonly called the Earl of Surrey, had answered and returned to the said sheriff's precept to him directed in the words following, endorsed on a copy of the said precept, (that is to say,) 'I have caused the within execution to be executed, and have levied of the goods and chattels of the within mentioned defendant, lying within my bailiwick, the sum of 3*l.* 13*s.* 2*d.*, and no more, the said defendant having nothing more within my bailiwick whereupon I could raise the within mentioned sum of 37*l.*, as within I am directed. Dated this 14th January, 1783. Surrey.' Therefore, by virtue of his said majesty's writs to me directed, reciting as or to the effect aforesaid, I command you and every of you, that ye, some or one of you, take the said John, if and so forth, and him safely keep, so that I may have his body before his said majesty at Westminster on Wednesday next after one month of Easter, to satisfy the said Sarah for 33*l.* 6*s.* 10*d.*, the residue of the damages aforesaid; and this and so forth. Given under the seal of my office," &c.

The instrument has a double aspect. It may operate as a **mandate** or a warrant at election; or it may operate, distributively, as **both**; authorizing the defendant or his deputy to take within the liberty, and the jailor to receive and keep the prisoner when so taken. Such a mode of construction is justified by *Blutcher v. Kemp*. (a) The addition of the words "my bailiffs," and "my bailiwick," is not repugnant to this construction; for it is admitted on the other side that the liberty is within the sheriff's bailiwick: and Dalton's Office of Sheriffs, ch. 39, p. 181, ed. 1700; *Grant v. Bagge*, 3 East, 128, and the argument in *Wentworth v. Broadwater*, Skinner, 413, are authorities to show that the bailiff of a liberty is, in effect, the servant or bailiff of the sheriff. The mandate, therefore, only describes the defendant according to the legal effect; that is, as one of the sheriff's bailiffs. [PATTESON, J. Ritson does not approve of that doctrine.] (b) In *Platel v. Douse*, 4 New Ca. 204, (33 E. C. L. R. 326,) a warrant to levy, in the ordinary form of a sheriff's warrant, was so addressed by the sheriff to one who was the deputy bailiff of a liberty: upon receipt of the warrant, the deputy acted upon it as if it had been a mandate to his principal; and, by direction of the chief bailiff, paid the money to the assignees of the judgment debtor, who had become bankrupt: and it was held that the chief bailiff could not afterwards refuse to return the mandate on the ground that it was a warrant and not a mandate. The case is in point, and is, in fact, a stronger one than the present; for the instrument here is, at least, ambiguous; (c) and the defendant has given proofs more unequivocal than were given in *Platel v. Douse* that he regarded it as a mandate. The case of *Munday v. Frogat*, 3 Keb. 71. 117. 125, is obscurely reported, and is entitled to little weight, and is moreover distinguishable; for the defendant here is attempting to waive the franchise for his own benefit, whereas there the party waived his privilege to the detriment of no one but himself.

By the direction of the Court, the demurrer to the seventh plea was now argued.

W. H. Watson, for the plaintiff. There is no precedent of a plea of estoppel on matter arising since the commencement of the action. [LITTLEDALE, J. Why should it not be as good as if pleaded at first?] It is no estoppel at all in this action. The rule is thus laid down in Dalton's Office of Sheriffs, ch. 42, p. 191, ed. 1700: A man may not have a direct averment against the return of the sheriff in the same action; but, in another action, he may; as in debt against the bailiff of a franchise for an escape of one; return of the sheriff that he had taken him by a warrant directed to him (the bailiff) on a ca. sa.; it may be averred that no such warrant was directed to him; and for this he cites Yearb. Pasch. 15 Ed. 4, f. 1; B. pl. 8. So in *Parkes v. Mosse*, Cro. Eliz. 181; S. C. 1 Leon, 144, where trover was brought by an executor against a sheriff's bailiff, who had taken goods of the testator under a fi. fa., it was held that the defendant might show the taking and the delivery over to the sheriff, and was not estopped by a return of the sheriff excusing himself for not executing the writ. The return of

(a) Note to *Wallace v. King*, 1 H. Bl. 15.

(b) See Ritson's Office of Bailiff of a Liberty, note, p. 8; p. 16; note, p. 24; note, p. 75.

(c) It was noticed by the Court, in the course of the argument, that a printed form of a sheriff's warrant had been used, a non omittas clause having been erased, and the address to the chief bailiff, and his deputies, inserted.

the sheriff may be *prima facie* evidence, even between strangers to it; *Gyfford v. Woodgate*, 11 East, 297: but it is not an estoppel even against himself in another action, as in case for not levying; *Brydges v. Walford*, 6 M. & S. 42. If it be an estoppel, it must be reciprocal; yet these cases show that the defendant is not estopped by it. As to the special ground of demurrer, the plea states a return day of the writ, whereas the writ of execution was returnable, not on a certain day, but immediately.

Wightman, *contra*. The return of a sheriff is "of such high regard," that no averment is admitted against it. *Com. Dig. Return*, (G.) In *Harrington v. Taylor*, 15 East, 378, (a) the plaintiff, in reply to a plea of the Statute of Limitations, stated process sued out within six years and duly returned and continued, to which the defendant rejoined that the process was not returned: it was admitted by the counsel for the defendant that the rejoinder was bad, as no averment could be made against the return. The return of a rescue is conclusive on the party, even on an indictment. (b) The only remedy is an action for damages against the sheriff for the false return. The sheriff takes by the hands of the defendant, and returns that he has the prisoners in custody; the plaintiff alleges that the defendant took them, and then let them go out of the liberty. He does not allege that the escape was within the liberty. The declaration and the return as pleaded, taken together, show that the escape complained of was the delivery to the sheriff, which is no good cause of action. [PATERSON, J. The allegation is, that the defendant suffered them to escape, and that they did escape, and go at large "wheresoever they would."] *Boothman v. The Earl of Surry*, 2 T. R. 5, (c) was new law. There was no instance of such an action before; and the principle of it is questionable. At all events it is inapplicable to this case. The bailiff there had a jail within the liberty; here no such jail is shown to exist. The defendant is therefore directed, and is obliged, to deliver the prisoners to the sheriff, that *he* (the sheriff) may have their bodies, &c. He cannot be sued for doing that which he is compelled by law to do.

Watson, in reply. In the cases in Comyn, where averments were not permitted against the return, the point arose in the same action as that in which the return was made. Upon any other construction of the rule there could not be an action for a false return. The return is conclusive only in the progress of the same cause, or for the purposes of an attachment; in other cases it is evidence only. The duty of a bailiff, where there is no prison in his liberty, is to keep the prisoners safely until delivered by due course of law. If there is no prison, he must do as the sheriff himself must have done if there had been no county jail. If the plea is no estoppel, it is idle. It does not even show that the sheriff has actually taken the debtors, but only that he has *returned* a taking. It seeks to defeat a vested cause of action by the act of a mere stranger.

LORD DENMAN, C. J. It is enough to say that there is no authority so full and direct as to support the doctrine contended for in favour of

(a) The rejoinder was there objected to, because it concluded to the country, and amounted to a plea of *nul tiel record*.

(b) But see Lord Ellenborough in *Gyfford v. Woodgate*, 11 East, 299.

(c) See Riton's Office of Bailiff of a Liberty, p. 23, 24 n, who refers to *Appleton v. Burr* Cro. El. 168. 289, cited also Cro. Jac. 242.

the 7th plea. I apprehend that such estoppels as this apply **only** to proceedings in the action in the course of which they arise. As to the rule to enter a verdict for the plaintiff, the question is, whether the sheriff directed a mandate to the defendant. The only plausible argument in favour of the plaintiff arises from the address of the warrant, and the use of the word "deputies" in it. But we must not require so much nicety and exactness in this respect. The document treats the defendant as one of the sheriff's bailiffs, and requires him to **make** the arrest, not in the defendant's liberty, but in his, the sheriff's, bailiwick. It appears, therefore, upon the whole, that it must be taken to be an ordinary warrant.

LITTLEDALE, J. The fact stated in the 7th plea is not pleadable as an estoppel. It is quite consistent with the declaration, and is beside it. The declaration states a writ, and an arrest under it by the defendant. Writs of execution being now returnable immediately, the *ca. sa.* was returnable as soon as it was executed. The declaration then states that *afterwards* the defendant suffered the escape. This was a complete cause of action; and the subsequent return of the sheriff, that he had the bodies in his custody, is no answer. Then, as to the other point, the allegation which describes this instrument as a mandate is not supported. Though directed to the defendant as the chief bailiff, it calls him, and the other persons addressed, "my bailiff," and commands the arrest, "so that I may have their bodies." It is a warrant to the defendant in the character of general bailiff to the sheriff.

PATTESON, J. As to the demurrer, the return is relied upon as conclusive in all cases except on an action for a false return; but this is not so. The Court will so far give credit to it as to act on it in the case of an attachment; but on an indictment it would only be evidence. Who are the parties to this action? It is against the bailiff of the liberty, as such, for suffering the plaintiff's debtor to escape and go at large. The sheriff's return can be no answer to this. He makes a return according to the answer he receives from the bailiff. To make this an estoppel would be to bar an action for an escape by a false statement, originating, perhaps, with the bailiff himself. The case cited from the *Yearbook* is strong to show that a return is conclusive only in the particular cause in which it is made; and there is no authority the other way. With respect to the point reserved at the trial, it is difficult to say whether the document is a mandate or warrant. Of the various forms produced from the files of the Court, the earlier ones are addressed to the bailiff of the liberty or his deputies, only. Here it is plain that the common form of a sheriff's warrant has been filled up with the name of the chief bailiff. If intended for a mandate, it should not have directed an arrest to be made in the bailiwick of the sheriff. The allegation in the declaration implies a mandate of limited execution; whereas the document shown in proof of it is either a general warrant, or is altogether defective and bad. I think that, where the bailiff of a franchise is addressed as an officer or bailiff of the sheriff, he may waive his franchise and act upon the warrant as an ordinary sheriff's officer, as he appears to have done in this case. As to the alleged custom for the chief bailiff to arrest and deliver to the sheriff, we cannot take it into consideration. [WILLIAMS, J., concurred.]

Rule for setting aside the verdict discharged.
Judgment for the plaintiff on the demurrer

PLEVIN and Another against PRINCE.—p. 494.

Before stat. 7 W. 4 & 1 Vict. c. 55, the sheriff was not entitled to take from a party arrested a larger fee, for detaining him till bail given, than the 4d. allowed by stat. 23 H. 6, c. 9.

And as sheriff's officer, taking more, was liable to the penalty under stat. 32 G. 2, c. 28, ss. 1, 12, though appointed, by the plaintiff in the original cause, a special bailiff for making the arrest.

DEBT against a sheriff's bailiff for a penalty of 50*l.*, under stat. 32 G. 2, c. 28, s. 12.

The declaration stated that a *capias* on mesne process issued out of the Exchequer, to wit, on 18th January, 1837, against the plaintiffs, directed to the sheriff of Cheshire, endorsed for bail for 187*l.* 10*s.*; that the sheriff afterwards, to wit, 18th January, 1837, directed his warrant to the defendant, being his bailiff, to be executed; that defendant, to wit, 19th January, 1837, arrested the plaintiffs, and, while they were in his custody, to wit, on the day and year last aforesaid, demanded, took, and received of and from them a certain sum of money, to wit, 2*l.* 2*s.*, for detaining them under and by virtue of the writ and warrant until after they had given bail to the sheriff; which sum, so demanded, &c., was a greater sum of money than, at the time of the taking or demanding thereof, was by law allowed to be taken or demanded by the defendant of and from the plaintiffs on that occasion, contrary to the form of the statutes, &c.

Seventh plea. That defendant did not demand, &c., for detaining, &c., a greater sum of money than, at the time of taking or demanding thereof, was by law allowed to be taken or demanded by the defendant of and from the plaintiffs on that occasion, in manner, &c.: conclusion to the country. Issue thereon.

There were also other issues of fact.

On the trial before ALDERSON, B., at the Cheshire Summer assizes, 1837, the arrest, &c., and the demanding and taking of the 2*l.* 2*s.*, were proved; and it appeared, as was contended for the defendant, that the defendant had been appointed special bailiff to make the arrest by the plaintiff in the original action. The counsel for the plaintiffs rested their case upon the 2*l.* 2*s.*, being a larger sum than was allowed by stat. 23 H. 6, c. 9: the defendant's counsel contended that the sum was not regulated by this statute, and that the plaintiffs were bound to give evidence that the sum was larger than that allowed by law. The learned Judge directed a verdict for the plaintiff on all the issues, reserving leave to move to enter a verdict for the defendant on the issue upon the seventh plea.

In Michaelmas term, 1837, *Cottingham* obtained a rule accordingly.

Welsby and *R. G. Temple* now showed cause. The officer has taken more than the law allows. Stat. 23 H. 6, c. 9, limits bailiffs of sheriffs to the sum of 4*d.* for the fees to be taken by them of any person arrested or attached. Stat. 32 G. 2, c. 28, s. 1, prohibits sheriffs, bailiffs, or other officer or minister whatsoever, from demanding or receiving any other or greater sum of money "than is or shall be by law allowed to be taken or demanded for any arrest or taking, or for detaining, or waiting till the person or persons so arrested or in custody shall have given an appearance or bail;" and sect. 12 enacts that any sheriff, under-sheriff, bailiff, &c., who shall offend against the act, shall forfeit to the party

aggrieved 50*l*. Sects. 5 and 6 provide for the settling and publishing the fees to be taken by gaolers: these last fees are, however, not applicable to the case of arresting or detaining till bail be given; *Martin v. Bell*, 6 M. & S. 220. There is, therefore, no fee allowable, unless under stat. 23 H. 6, c. 9.(a). It is true that in *Martin v. Bell* it was said that the allowance by the officer of the Court upon taxation was the allowance by the Court, and showed what was the allowance by law. But there the plaintiff had given evidence that the defendant had taken more than the sum allowed on taxation, which was one guinea; and the Court gave judgment for the plaintiff. The decision, therefore, shows no more than that a bailiff must not take a sum exceeding the sum allowed on taxation; not that he may take as much. In *Martin v. Slade*, 2 New Rep. 59, a plaintiff was unsuited for not giving evidence that the sum taken exceeded the sum allowed by law, though it appeared that the sum did exceed that allowed by stat. 23 H. 6, c. 9. But in *Dew v. Parsons*, 2 B. & Ald. 562, it was held that a sheriff was liable to an action for money had and received for all that he had taken above the 4*d*.; and HOLROYD, J., said that the allowance of more in taxation might be explained on the supposition that the party, at whose suit the arrest was made, had employed a special bailiff, at an increased expense, which the master had allowed, though the sheriff could not have claimed it. In *Foster v. Blakelock*, 5 B. & C. 328, (11 E. C. L. R.,) it was also said that a sheriff could demand no more, though a party employing a special bailiff might be held to contract impliedly for what it was usual to give. In *Innes v. Levi*, 2 Scott, 189, (30 E. C. L. R.,) a sheriff's officer was held liable to the penalty for taking more than the 4*d*. That case is precisely in point. Stat. 23 H. 6, c. 9, must have been in force up to the passing of stat. 7 W. 4 & 1 Vict. c. 55, (15th July, 1837;) for the latter statute expressly repeals the former, so far as relates to the amount of fees, and provides for another scale.

Cottingham and *E. V. Williams*, contrà. Stat. 32 G. 3, c. 28, s. 12, is a penal enactment, and will be construed strictly. Stat. 23 H. 6, c. 9, does not apply, in words, to fees taken for detaining till bail be given; but the language of stat. 32 G. 2, c. 28, s. 1, shows that some fee may be taken for this: the only rule therefore must be, to take that which the Court, by its officer, allows to be proper. In *Martin v. Slade* the decision was, that the party seeking to enforce the penalty must prove what sum was allowed by law, and that the sum named in stat. 23 H. 6, c. 9, was not the sum intended by stat. 32 G. 2, c. 28, s. 12. Indeed, if that were so, the officer would have been actually out of pocket by the expense of the bail-bond, when a stamp was necessary. In *Martin v. Bell* Lord ELLENBOROUGH distinctly held that the allowance by the officer of the Court was the proper evidence of the sum allowed by law. There the fee was taken, as here, for detaining till bail was given. In *Innes v. Levi* the fee seems to have been taken for arresting; that case is therefore inapplicable. The dictum in *Foster v. Blakelock* is inapplicable for the same reason. Here, too, it appears that the defendant was a special bailiff; he was, therefore, within the principle laid down by HOLROYD, J., in *Dew v. Parsons*.

Cur. adv. vult.

LORD DENMAN, C. J., in the vacation after this term (18th June) delivered the judgment of the Court.

This was an action for a penalty against a sheriff's officer for extor

tion. A verdict was found for the plaintiff, subject to a motion for setting it aside, as to one issue, and entering one for defendant, for a supposed defect in evidence; no proof having been given of the fee lawfully due upon an arrest. The case of *Martin v. Slade* was cited, where Sir J. MANSFIELD and the Court of Common Pleas held that the statute of Henry VI. must not be taken as limiting the legal fees. But that must be allowed to be very loose doctrine, and has been rejected by both Lord ELLENBOROUGH and Lord TENTERDEN, in cases cited on the argument. The former learned judge was indeed supposed to have held, in *Martin v. Bell* that legal fees must be proved such, by being hung up in the manner prescribed by stat. 32 G. 2, c. 28. But that is not the fair import of his language. What he meant was, that, even assuming evidence of the law in that case to be necessary, the habitual allowance of particular fees by the master in taxation furnished that evidence. It does not by any means follow that we want, or ought to require, any other proof than the statute, which was in force when this action was tried, and cannot be repealed by any usage.

In moving for the new trial, it was said that the plaintiff had appointed his own bailiff, and that so the charge might be legal. HOLROYD, J., in *Dew v. Parsons*, 2 B. & Ald. 567, appears to admit that such charge might be allowed; but that was a question as to the officer's right to charge plaintiff's attorney who employed him, possibly, on those terms, nothing was said that could warrant him in extorting an illegal fee from the arrested person.

We therefore think that the rule must be discharged.

Rule discharged.

WILLIAMS against BURGESS.—p. 499.

Plaintiff entered into a parol agreement to sell to defendant a mare for 20*l.*, subject to the condition that, if it should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it on request. Plaintiff delivered the mare and received 20*l.* On its proving to be in foal, he tendered to defendant 12*l.*, and requested him to return the mare, which defendant refused to do. Held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to defendant; and that the delivery of the mare to defendant took the whole agreement out of the Statute of Frauds, 29 C. 2, c. 3, s. 17, so as to enable plaintiff to sue defendant for the refusal to return it.

ASSUMPSIT. Declaration stated that, in consideration plaintiff would sell and deliver to defendant a mare, which plaintiff supposed to be in foal, for 20*l.*, subject to the condition that, if the mare should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it to plaintiff on request, defendant promised, if it proved in foal, and plaintiff paid 12*l.*, to return it. Averment of sale and delivery of the mare for 20*l.*, subject to the above condition; that it proved to be in foal; that plaintiff then tendered to defendant 12*l.* and requested him to return the mare; but defendant refused so to do. Plea, *non assumpsit*.

On the trial at the York summer assizes, 1837, before PARKE, B., the plaintiff proved a verbal agreement, as stated above, and the acceptance of the mare and payment of the money by the defendant. It was objected, on the part of the defendant, that the agreement on which the action was brought was a distinct agreement for a resale of the mare, within sect. 17 of the Statute of Frauds, 29 C. 2, c. 3, and

ought to have been in writing. But the learned judge, considering it to be merely a qualification of the original contract of sale, which was executed, overruled the objection, reserving leave for the defendant to move to enter a nonsuit, and for the plaintiff to object that this defence could not be shown upon the plea of Non assumpsit. There was a verdict for the plaintiff.

In Michaelmas term, 1837, *Knowles* obtained a rule nisi to set aside the verdict on the points reserved, and enter a nonsuit.

Alexander now showed cause. The objection is not open upon the general issue. [Upon this point *Elliott v. Thomas*, 3 M. & W. 170, on section 17 of the Statute of Frauds, and *Buttemere v. Hayes*, 5 M. & W. 456, on the fourth section, were cited; (a) but, as the Court pronounced no opinion upon it, the argument is here omitted.] The contract for resale is not a distinct and independent one, but part of the original one, which was made good by acceptance of the mare and payment of the price. That the delivery was sufficient to take the case out of the statute is shown by many authorities. [*Knowles*, for the defendant, stated that he did not dispute those authorities, and admitted that the original agreement was made good by delivery.] Then the condition to redeliver cannot make it void. A state of things, contemplated by the original contract and parcel of it, has arisen, which now entitles the plaintiff to sue without any fresh payment or writing.

Knowles, contra. There are two distinct contracts; one is executed; the other executory. Both are within the statute; and the latter cannot be enforced, for want of the proper formalities. [Lord DENMAN, C. J. Suppose the whole had been in writing at first, would it require two stamps?] Perhaps not; but that is not a proper test. It is certain that an agreement may contain two distinct stipulations capable of being treated as distinct contracts, of which one may be void and the other good; *Wood v. Benson*, 2 Cr. & J. 94; S. C. 2 Tyrwh. 93. [PATTERSON, J. I think that, when that case has been cited, the Courts have not been disposed to extend it.] There are two agreements entered into at the same time. Suppose the agreement had stipulated that, in a certain event, the defendant should sell and deliver to the plaintiff another horse, or the foal itself: a writing would then have been necessary; for there would be no acceptance of any thing by the buyer, but only by the defendant, the seller; yet it cannot, in principle, make any difference that the horse to be sold happens to be the same. *Watts v. Friend*, 10 B. & C. 446, (21 E. C. L. R. 109,) is nearly in point. There the agreement was, that the plaintiff should furnish the defendant with seed; that the defendant should sow it on his own land; and should sell and deliver to the plaintiff the whole crop of seed produced therefrom. The plaintiff supplied the seed; and the defendant accepted and sowed it, but refused to sell the crop according to the agreement. It was held that, as the agreement was not in writing, the Statute of Frauds was a defence. Yet it might have been urged that the contract required no writing, because there was a delivery of the seed to the defendant.

Lord DENMAN, C. J. This is a sale by the plaintiff to the defendant on particular terms, one of which is a return of the article sold in a

(a) The decisions in the Exchequer were cited in a case of *Eastwood v. Kenyon*, argued in this term, (19th June,) upon the fourth section; and this Court then intimated its adherence to those decisions.

certain event ; the acceptance of the thing sold takes the whole contract out of the statute. The case differs from *Watts v. Friend*, where the resale was of a different thing.

LITTLEDALE, J. The plaintiff is willing to part with his property on certain conditions, which are part of the agreement. It is not an independent contract of sale on which he sues, but the original contract, which was a qualified sale. It is like the case of the delivery of a horse on trial ; when the buyer returns it, after trial, it is not a resale. I have not the slightest doubt on the case.

PATTESON, J. It is one entire contract, and not two distinct contracts. It is a sale on the terms that the mare and part of the price should be returned in a certain event. If, indeed, the defendant had agreed to sell to the plaintiff the foal, the case might have been different. In *Watts v. Friend*, the bargain was to sell to the plaintiff an entirely different thing, and not merely to return to him the same article. *Wood v. Benson* shows only that there may be two contracts on one piece of paper, of which one may be bad, the other good.

WILLIAMS, J., concurred.

Rule discharged.

SUSANNA HOLMES against WILSON and Two Others.—p. 503.

Trespass is the proper remedy for wrongfully continuing a building on plaintiff's land, for the erection of which plaintiff has already recovered compensation ; and a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue such erection. Therefore, where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into Court in full satisfaction of the trespass : Held, that, after notice to defendants to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar.

TRESPASS for *breaking and entering* five closes of plaintiff, with force and arms, and, without leave and license of plaintiff, *keeping and continuing* in and upon the said closes ten erections called buttresses, theretofore without the leave and license of plaintiff erected by defendants in and upon the said closes, and thereby encumbering the said closes, and preventing plaintiff from having the use and enjoyment thereof.

Plea 1. Not Guilty. 2. That plaintiff heretofore, to wit, on, &c., in the Court of King's Bench at Westminster, impleaded defendants in an action of trespass, and declared against said defendants in that action for committing the very same trespasses in the declaration in this present suit above mentioned : whereupon defendants then pleaded that plaintiff ought not further to maintain her action, because defendants then brought into Court the sum of 25*l.*, ready to be paid to plaintiff, and that plaintiff had not sustained damages to a greater amount, &c. : that defendants then paid the said sum into Court : and that plaintiff afterwards took the same out of Court, and taxed her costs in that action : that defendants then paid the said costs ; and plaintiff accepted the said sum, with the costs, in full satisfaction of the causes of action in the said action of trespass complained of, and of all damages and costs occasioned thereby, and proceeded no further in that action. Averment of the identity of the trespasses in the two actions, and verification.

To this last plea the plaintiff newly assigned that she brought her action for other and different trespasses than those complained of in the former action. Plea to the new assignment, Not Guilty.

On the trial at the Yorkshire Summer assizes, 1837, before PARKE, B., it appeared that the plaintiff was the owner and occupier of lands, through which a road had been made under the powers of stat. 4 & 5 W. 4, c. xxxii., (local and personal, public,) (a) which prescribes the line of the road and provides that no deviation shall be made in the lands of the plaintiff more to the north than the prescribed line. The defendants (of whom one was a trustee under the act, and the others a contractor and his foreman) raised an embankment, supported by a wall, on that part of the line which passed through the plaintiff's land. The trustees considering it necessary to give further support to the embankment, the defendants, for this purpose, erected certain buttresses upon the north side of the wall and of the prescribed line, and upon the closes named in the declaration. This was done without the plaintiff's consent; and it was admitted to be contrary to the provision in the act, which protected her land from further deviation on this side.

The plaintiff thereupon commenced an action of trespass against the three present defendants, together with two others not named in this action. The declaration in that action complained of breaking and entering the same five closes, digging up the earth, damaging the herbage, encumbering the soil with bricks, mortar, &c., and erecting thereon the buttresses, and keeping and continuing the said bricks, mortar, &c., so placed thereon, and the buttresses so erected, for a long space of time, to wit, &c. The defendants paid 25*l.* into Court, which the plaintiff accepted in satisfaction. The proceedings in this former action were the subject of the plea in the present one.

The former action was brought immediately after the erection of the buttresses, on a writ issued 7th December, 1836.

On the 3d February, 1837, the money was accepted by the plaintiff in satisfaction.

On 9th of May, 1837, judgment was entered for the plaintiff.

On the 13th February, 1837, the plaintiff caused a notice to be served on defendants, requiring them, within twelve days, to remove the buttresses erected upon her land, and giving notice that, if they did not do so, an action would be brought for continuing the buttresses on the land, and further actions from time to time until compliance with the requisition. The trustees, considering that the buttresses were necessary to support the road, and that the former payment by them was an equivalent for the permanent use of the land, refused to remove them. On 27th April following, the present action was commenced. It was not shown that the defendants, or any of them, had entered upon the land of the plaintiff, or had done any act upon it since the trespasses complained of in the first action. (b) One of them (the contractor) had entered into an agreement with another of the defendants (the trustee)

(a) Entitled, "An Act for repairing and maintaining the road from Quebec in the parish of Leeds, in the West Riding of the county of York, to Homefield Lane End in the same parish, with a bridge or bridges on the line of such road; and for making and maintaining certain branch roads to communicate therewith."

(b) Upon showing cause against the rule nisi in this case, it was alleged by the plaintiff's counsel that such evidence had been given; but Parke, B., being referred to by this Court, stated that he had no recollection of such evidence, and that the only question, on the trial, was, whether the action lay for continuing the buttresses.

in 1836 to keep the road in repair for two years. On the part of the defendants it was contended that the action was improperly conceived in trespass; that, by force of the local act and of the General Turnpike Act, 3 G. 4, c. 126, s. 147, the plaintiff was barred of her action after three months from the date of the original trespass; and that the damages recovered in the former action were to be regarded as a full compensation for all injury occasioned by the buttresses, or as a "satisfaction out and out." The learned baron nonsuited the plaintiff, reserving liberty to move to enter a verdict for her with nominal damages.

In Michaelmas term, 1837, *Starkie* obtained a rule nisi according to the leave reserved.

Alexander now showed cause. The proper form of action, if any will lie, is case, and not trespass. In *Lawrence v. Obee*, 1 Star. 22, Lord ELLENBOROUGH was of that opinion; and there is no authority to show that a mere continuance is a trespass. Still less is such continuance a trespass, where the act complained of was originally done in pursuance of an act of parliament. The General Turnpike Act, 3 G. 4, c. 126, s. 147, (which extends to all local acts for making, &c., turnpike roads, sect. 4,) limits suits "for any thing done in pursuance of the act" to "three months after the fact committed," and provides that the defendant may give the special matter in evidence on the general issue. Here the buttresses were erected more than three months before the commencement of this action; and it would defeat the object of the act, if fresh actions could be brought for a mere continuance. In *Wordsworth v. Harley*, 1 B. & Ad. 391, (20 E. C. L. R. 406,) the defendant, as surveyor of highways, had added part of the plaintiff's land to the highway, and separated it from the rest by building a wall between the rest of the land and the road. After the lapse of three months the plaintiff sued defendant for building the wall, and thereby separating part of his close from the rest, and for "keeping and continuing" it so separated. It appeared that the wall was built, and the separation completed, more than three months before action brought; but the wall had been raised and finished within that period. It was held that the defendant was protected by the limitation clause in the General Highway Act. *Lord Oakley v. The Kensington Canal Company*, 5 B. & Ad. 138, (27 E. C. L. R. 64,) (a) is also in point. *Smith v. Shaw*, 10 B. & C. 277, (21 E. C. L. R. 75,) also shows that interference by giving improper directions for the doing of any thing supposed to be in execution of the provisions of the statute, is a "thing done in pursuance of the act." But, at all events, the former recovery is a complete bar; the damages given on the first action must be considered as the full estimated value of the land thus permanently occupied by the buttresses. The damages were in respect of prospective as well as past injury; the judgment operated as a purchase of the land. [Lord DENMAN, C. J. If the property was changed, why did you not put in a plea to that effect?] It was needless to raise that question. The plea states a fact, which either shows a transfer of the property, or, at all events, precludes any further action for a trespass upon it. [PATTESON, J. How can you convert the recovery, and payment of damages for the trespass,

(a) And see *Jenkins v. Cooke*, note (a) to *Frazer v. The Swansea Canal Company*, 1 A. & E. 372, (28 E. C. L. R. 105.)

into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it.] No act is shown to have been done since the former recovery. The defendants have no right to enter the plaintiff's land, without her leave, in order to remove the nuisance; so that, unless the plaintiff removes it herself, the defendants will be exposed to continual actions, or be obliged to commit a further trespass by entering to remove it.

Starkie and *Crompton*, *contrà*. The action lies, and is in the proper form. Every continuation of an original trespass is a fresh one. [*LITTLEDALE*, J. If the defendant throws a heap of stones on the plaintiff's close, and there leaves them, will trespass lie from day to day, till they are removed?] "The continuing of a trespass from day to day, is considered in law a several trespass on each day;" note (1) to *Earl of Manchester v. Vale*, 1 Wms. Saund. 24, citing *Monckton v. Pashley*, 2 Ld. Raym. 976. The Court of Exchequer have recently decided this point in *Hudson v. Nicholson*; (a) where it was held that a count for keeping and continuing timbers, which had been placed on the plaintiff's close before he became possessed of it, was a count in trespass, and not case; and the case was there likened to that of a defendant who persists in holding out a pole into his neighbour's land, and who would be liable in trespass as long as he continued to do so. *Rosewell v. Prior*, 2 Salk. 460, (b) is similar to the present case, except that it was an action on the case for a nuisance. There an action for continuing a nuisance to the plaintiff's lights was held to lie after a recovery for the erection of it. As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be, that a person who wants his neighbour's land, might always buy it against his will, paying only such purchase-money as a jury may assess for damages up to the time of the action. If the property was changed, when did it pass? suppose the plaintiff had brought ejectment for the part occupied by the defendant's buttresses, would the recovery of damages in trespass be a defence? There is no case to show that, when land is vested in a party, and fresh injuries are done upon it, fresh actions will not lie. Then, as to the powers of the local act and the limitation in the General Turnpike Act, the case is clearly not within either of them; for the local act expressly forbids any deviation to the north of a certain line, and the trustees wilfully directed the buttresses to be built on the ground beyond the line, in order to support their own defective works within it. But, even if the defendants are to have the benefit of the act, an action will lie for a continuing injury. *Roberts v. Read*, 16 East, 215, shows that the time runs from the date of the injury complained of, though trespass may lie for the act done. In *Wordsworth v. Harley*, the action was by a reversioner, whose cause of action was complete on the first erection of the wall, and not by an occupier for a continued trespass. [*PATTESON*, J. It is there remarked by *BAYLEY*, J., that a continuation is not a new fact committed, within the statute. Indeed, if it were so, the act would be nugatory. You might bring an action at

(a) Since reported in 5 M. & W. 437; but the illustration, as there reported, (p. 446,) differs from that mentioned in the present argument. See also the judgment of *Le Blanc* and *Bayley*, Js., in *Winterbourne v. Morgan*, 11 East, 395.

(b) See also *Johnson v. Long*, 1 Salk. 10; *Rex v. Pedly*, 1 A. & E. 822, (28 E. C. L. R. 320.)

any time, whether there had, or had not, been a previous recovery.] The distinction is between an action for damage consequential upon an injury for which the plaintiff has already recovered a judgment, as in *Fetter v. Reale*, 1 Salk. 11, and an action for a continuing injury repeated *de die in diem*, in which the plaintiff can only recover damages up to the issuing of the writ.

LORD DENMAN, C. J. The defendants are clearly not within the protection of either statute. (a) Then, the former and the present action are for different trespasses. The former was for erecting the buttresses. This action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass.

LITTLEDALE, PATTESON, and WILLIAMS, Js., concurred.

Rule absolute to enter a verdict for the plaintiff. (b)

(a) It did not appear that the Court assumed the original act to have been done *bonâ fide* with the intent of carrying the statute into effect: and the decision upon the limitation clause is therefore not noticed in the marginal abstract.

(b) By a recovery in trespass for taking, or trover for converting, *personal chattels*, followed by satisfaction, the property is altered, and vests in the defendant; for "*solutio pretii emptionis loco habetur*." Jenk. Cent. p. 189. (Cent. 4, ca. 88;) Keilw. 58 b; *Adams v. Broughton*, 2 Stra. 1078. But it is otherwise where the damages were not estimated on the footing of the full value; and this, it seems, may be shown in a replication to the plea of the former recovery. *Lacey v. Barnard*, Cro. Car. 35. See also *Field v. Jellicus*, 3 Lev. 124, and the judgment of Holroyd, J., in *Morris v. Robinson*, 3 B. & C. 206, (10 E. C. L. R. 49.) *Quæritur*, whether the plaintiff, in the principal case, might not have recovered damages in respect of the expense of removing the buttresses herself; and the effect of such recovery?

GAREY against PYKE.—p. 512.

Plaintiff and defendant agreed that defendant should recommend customers to plaintiff, who was a tailor, and that plaintiff should allow defendant 10 per cent. upon the business so procured, to be received in clothes by defendant from time to time, as he might want them; and that a settlement of accounts should take place between the parties every six, or at farthest every twelve months.

Plaintiff having sued in debt for goods sold and delivered, and having merely proved the delivery and acceptance of clothes,

Held, that he could not recover, but that, on *nunquam indebitatus*, he was bound to prove a settlement of accounts on which the balance was in his favour.

Semble, that, had there been no stipulation as to the settlement of accounts, it would have been sufficient for plaintiff to prove the delivery and acceptance, and would have lain on defendant to prove a per centage due to him to the amount of what was so delivered.

DEBT for goods sold and delivered, work and labour, and on an account stated. Pleas: 1. *Nunquam indebitatus*. 2. A set-off for (among other matters not proved) the work and labour, care, &c., of defendant, as agent for plaintiff, and for commission and reward: the replication to which denied such debt from the plaintiff to the defendant.

On the trial before LORD DENMAN, C. J., at the London sittings after Michaelmas term, 1837, the delivery and acceptance of the goods, consisting of clothes, was proved; but the defendant proved that, before the delivery, the following agreement was entered into between the

plaintiff and defendant. "Memorandum of agreement made, this 31st day of December, 1835, between Hugh Pyke, of," &c., "law agent, an' G. D. Garey of," &c., "tailor, whereby the said Hugh Pyke, being in his capacity of law and general agent enabled to advance the interests of persons engaged in trade and commerce, hereby agrees, at the instance and request of the said G. D. Garey, to introduce a few of his friends and connections as customers to the said G. D. Garey, upon the express condition that he, the said G. D. Garey, agrees to allow the said Hugh Pyke, for his trouble and exertions, a fee of 10 per cent. upon the gross amount of all business and connections generally introduced by or from him the said Hugh Pyke to the said G. D. Garey; or any other connection, which may be introduced through the medium of the aforesaid connections and friends of the said Hugh Pyke to the said G. D. Garey, shall also be allowed [*Sic*] a like fee of 10 per cent.; and it is hereby understood that such allowance, remuneration, or fee, is to be received by the said Hugh Pyke in clothes, to be ordered by him, the said Hugh Pyke, from time to time as he may want the same; and that a settlement of accounts between the said parties shall take place every six months, or, at the farthest, in twelve months. In witness whereof," &c. (Signed by the plaintiff and defendant.)

The counsel for the defendant contended that it was incumbent on the plaintiff to show that, under the special terms of this agreement, an account had been settled upon which the balance was in favour of the plaintiff. His lordship directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit. In Hilary term, 1838, Sir *John Campbell*, Attorney General, obtained a rule accordingly.

E. James now showed cause. The agreement provides, not that all the clothes shall be paid for by the commission, but that the commission shall be paid for by clothes. So far, therefore, as the clothes exceed the commission, they are delivered without reference to the agreement, and debt lies. In *Sheldon v. Cox*, 3 B. & C. 420, (10 E. C. L. R. 137,) the plaintiff gave a horse to defendant for a horse belonging to defendant, and five guineas; and, the defendant's horse having been delivered to the plaintiff, but the five guineas not paid, it was held that the five guineas might be recovered in indebitatus assumpsit for horse sold and delivered. The plaintiff here shows a *prima facie* right by proof of the delivery and acceptance of the clothes: it was for the defendant to meet that, by evidence that a larger sum than the value of the clothes was due for commission. If the defendant had sued for the commission, the plaintiff would have been bound to show that he had delivered clothes to the amount.

Sir *J. Campbell*, Attorney General, and *Busby*, contra. The agreement provides for a periodical settlement of account, for the purpose of determining which party is indebted to the other. No action lies for what is none under this agreement till such an account is settled. This is not like a common contract between the tradesmen to work for each other, without any provision for settling the accounts: though, even in such a case, it may be contended that it would not be sufficient to declare simply for work and labour, and leave the defendant to meet the case by showing a counter claim under the agreement. *Edmunds v. Harris*, 2 A. & E. 414, (29 E. C. L. R. 126,) which seems to be an authority the other way, is overruled. (*a*)

Lord DENMAN, C. J. We must take it as if the special agreement had been the first thing put in evidence. Then the plaintiff would have had

(a) See *Hayselden v. Staff*, 5 A. & E. 153, (31 E. C. L. R. 307.)

to show that the value of the clothes delivered had exceeded the value of the commissions upon the settlement of accounts.

LITTLEDALE, J. Except for the stipulation as to the settlement of accounts, I think the plaintiff might have recovered. But that made it incumbent upon the plaintiff to show, as a preliminary step, that a settlement had taken place, upon which the balance was in his favour.

PATTESON, J. Upon the issue on the plea of *nunquam indebitatus*, the plaintiff had to show that, at some given time, the defendant was in his debt. If there had been no agreement, he might have done this by proving the delivery and acceptance of the clothes. Here the case is as if the plaintiff had begun by putting in the agreement; and then, as that shows that the defendant was to receive his per centage in clothes, it would have been for the defendant to show a per centage due to him to the amount of the value of the clothes, except for the stipulation as to the periodical settlement of accounts. But that stipulation shows that the parties did not mean that either should be entitled to sue the other whenever there was any balance one way or the other, however trifling; but that the balance was to be taken periodically, and that then the party in whose favour it should be might claim it. Therefore, till such a settlement took place, there was no debt; and it lay on the plaintiff to prove the fact of the settlement and the balance.

WILLIAMS, J. This case is in a very narrow compass. The question is, whether the defendant was indebted *modo et forma*, that is, in a sum to be paid on request. When the agreement was put in, it was clear that this was not an ordinary contract; and the plaintiff was to show that there was a debt within the terms of the agreement.

Rule absolute.

HENRY MERRY and THEOPHILUS MERRY against CHAPMAN, Esquire.—p. 516.

In debt against the marshal of Q. B. for an escape of W., a prisoner in custody under a *ca. sa.* at the suit of plaintiff, defendant pleaded that W. had the privilege of the rules; that L. sued out a *capias* on *mesne process* against W.; that L. and plaintiff, well knowing that W. was so privileged, and not legally liable to be arrested out of the rules, "fraudulently, illegally, and covinously, combined and conspired" with others to procure W. to be arrested on L.'s writ: and, in pursuance of such fraudulent, &c., caused a sheriff's officer to watch W. to ascertain whether he went beyond the rules, and to arrest him and keep him without the rules, if he did; that W., without defendant's consent, went without the rules; and, while he was so, and intended to and was about to return within the rules, plaintiff and L., with others in collusion with them, in further pursuance, &c., wrongfully and covinously caused W. to be arrested and conveyed to a place without the rules, and there detained during such time as was required to enable plaintiff to sue defendant for the escape; that, had not W. been so collusively and illegally detained, he could have returned within the rules before the commencement of the suit; that, after the commencement, W. returned within the rules, and had been in defendant's custody ever since; and that defendant had no notice of the escape before the commencement of the suit. Replication *de injuria*, as to all but the allegation that L. sued out and prosecuted his writ, &c., while W. was entitled to the rules.

1. It was proved that U. employed a person to watch for W. and procure his arrest and detention without the rules, at the suit of L., while W. appeared to be intending to return within the rules; and that, during the detention, U. went with the attorney's clerk to take out the writ in the action for the escape. The jury having been satisfied that plaintiff was a party to U.'s proceedings, and the judge having directed a verdict for the plaintiff, this Court, on motion, ordered a verdict to be entered for the defendant, on the ground that the jury might

infer plaintiff's privity from his adopting U.'s acts by bringing the action; and that such privity proved the substance of the issue.

2. But the Court granted judgment for the plaintiff non obstante veredicto, the plea not showing that W. *would* have returned within the rules, had he not been detained without.
3. The rule for entering the verdict for the defendant having been obtained in the first, and made absolute in the sixth term after the trial, the Court, upon making it absolute, granted the rule nisi for judgment non obstante veredicto, considering the case an exception from the rule of Hil. 2 W. 4, l. 65.

DEBT. The declaration stated that heretofore, to wit, in Michaelmas term, 7 W. 4, the plaintiffs recovered judgment in this Court, in assumpsit, against James Wright, for damages and costs; and afterwards, to wit, 21st January, 1837, Wright was removed by *habeas corpus cum causâ*, directed to the sheriff of Surrey, who had taken Wright under a *testatum ca. sa.* on the judgment, and had him in custody under the last-mentioned writ: that, upon the return of the habeas corpus, Wright was committed by a judge to the custody of the marshal of this Court, charged, among other things, in execution, for the sum endorsed on the *ca. sa.*; that defendant, being marshal, received and had Wright in his custody, in the prison of the Marshalsea, in execution for the said sum, at the suit of plaintiffs: that afterwards, to wit, on 27th August, 1837 defendant wrongfully, unlawfully, and unjustly, without the leave or license of plaintiffs, and against their will, suffered and permitted Wright to escape and go at large from and out of the said prison, and out of the said custody of the said defendant, wheresoever Wright would, without restraint, &c., the plaintiffs being then and still wholly unsatisfied their damages, &c.

Fourth plea. That, after the commitment of Wright, and before and at the time of his escape, he had applied for and had obtained and was entitled to the privilege of residing without the walls of the prison, and of living and abiding within the rules: that, while he was so entitled, one Thomas Buckby Lefevre, heretofore, to wit, 26th October, 1837, sued out a *capias* (on mesne process) in this Court, directed to the sheriff of Surrey, endorsed for bail, which was delivered to the said sheriff, who made his warrant to George Rutland, his bailiff, marked for bail, which was delivered to Rutland to be executed: that, before and after the suing out of the writ and granting of the warrant as aforesaid, T. B. Lefevre, and the plaintiffs, well knowing that Wright had the privilege and benefit of the rules, and was not legally liable to, and ought not to be arrested or taken out of or beyond the limits or boundaries thereof, fraudulently, illegally, and covinously, combined and conspired together with divers other persons to cause and procure Wright to be taken and arrested on the said writ and warrant: and, in further pursuance of such fraudulent and covinous combination and conspiracy, caused and procured Rutland to watch and follow Wright to ascertain whether he at any time went beyond or exceeded the limits or boundaries of the said rules, and to arrest him by his body if he should go beyond, &c., and keep and detain him beyond the said limits and boundaries: that afterwards, to wit, on the said 26th August, and while Wright was entitled to, and had obtained the benefit of the rules as aforesaid, Wright, without the knowledge or consent and against the will of defendant, did go a little beyond the limits and boundaries of the rules, to wit, one hundred yards beyond such limits and boundaries: and, while Wright intended, and was about to return to and within the said limits and boundaries, plaintiffs and T. B. Lefevre, with others in collusion

with them, in further pursuance of the said fraudulent contrivance and combination, wrongfully and covinously caused and procured Wright to be arrested by his body, and carried and conveyed to a place of confinement, at a great distance from the said limits and boundaries of the rules, to wit, three miles beyond the said limits or boundaries, and caused and procured him to be kept and detained in such place of confinement, and out of and beyond the said limits and boundaries, for and during such time as was required to enable plaintiffs to sue and prosecute out of the said Court of our said lady the queen a certain writ of summons against the defendant for the said alleged escape, and serve the defendant with a copy thereof, for and as the commencement of this suit, to wit, for the space of six hours then next following: that, had not Wright been so collusively and illegally arrested and detained, he could have returned and been within the limits and boundaries of the rules before the commencement of this suit: that, after the commencement of this suit, and after defendant was served with a copy of the writ of summons, Wright was brought back again into the custody of defendant as such marshal, and that the defendant did thereupon then keep and detain, and always from thence hitherto hath kept and detained, and still doth keep and detain Wright in the custody of this defendant, as such marshal as aforesaid: and that defendant had no notice or knowledge of the said escape at any time before the commencement of this suit; which said escape in this plea mentioned, is the same, &c.: verification.

Replication. That, although true it is that T. B. Lefevre did, while Wright had obtained and was so entitled to the benefit of the rules, sue and prosecute out of the Court of our lady the queen, the said writ in the said plea mentioned, and that the sheriff did make his warrant in writing, directed to Rutland, as in that plea also mentioned, for replication, nevertheless, &c. (*de injuriâ absque residuo causa.*)

Issue thereon.

There were also other issues in fact.

On the trial before Lord DENMAN, C. J., at the Middlesex sittings after Hilary term, 1838, it appeared that Wright was an attorney; that a person named Underhill employed a man named Pope, to watch for Wright for several days up to 26th August, on which day Wright went to his own house, without the rules, and was there arrested at the suit of Lefevre. Underhill was not present at the arrest; but Pope was present, with the sheriff's officer. Wright had engaged to dine within the rules about two o'clock. Upon being arrested, Wright desired to be taken back within the rules; but the sheriff's officer, by taking him back by a circuitous route, caused a delay, during which, and before Wright returned within the rules, the writ in the present action was sued out and served upon the defendant. Underhill went with the attorney's clerk to take out this last writ, and at the same time took out a writ in an action against the defendant for Wright's escape, in a suit in which Underhill himself was plaintiff. Wright was afterwards brought back within the rules. Other evidence, including a correspondence between Wright and one of the plaintiffs, was put in, showing, as the defendant contended, that Underhill was the party really interested in the judgment obtained by the plaintiffs against Wright. The counsel for the plaintiffs contended that this evidence did not connect the plaintiffs with the arrest at the suit of Lefevre, within the allegations of the fourth plea. The other issues having been proved for

the plaintiff, the lord chief justice, as to the issue on the fourth plea, desired the jury to say whether they considered Underhill to have been employed by the plaintiffs to effect the arrest under the particular circumstances. The jury having found for the defendant on this issue, his lordship expressed his opinion that the plea was not proved, and also that it was bad; and he directed a verdict to be entered for the plaintiff on all the issues, reserving leave to move to enter a verdict for the defendant on the issue on the fourth plea. In Easter term, 1838, Sir *John Campbell*, Attorney General, obtained a rule accordingly.

Kelly, Crowder, and Ogle, now showed cause. (a) The plea alleges that the plaintiffs fraudulently, illegally, and covinously, combined and conspired to procure Wright to be arrested on the writ issued at the suit of Lefevre. Now, no evidence was given of the intervention of the plaintiffs. There may have been evidence for the jury that Underhill was a party to the proceeding: but he is not identified with the plaintiffs. Even admitting that Underhill was a party interested in the judgment obtained by the plaintiffs, upon which the ca. sa. issued under which Wright was in custody, that would show only that an agent of the plaintiffs had conspired; and conspiracy by an agent is not a conspiracy by the principal, unless the principal be privy to the conspiracy. But, in fact, the evidence does not show that Underhill was interested in the judgment. In *Hiscocks v. Jones*, Moo. & M. 269, (22 E. C. L. R. 303,) it was held that the marshal might defend himself by showing that the escape was by the fraud of a party for whose benefit the judgment had been assigned to another. Had such a defence been raised upon this record, the plaintiff would have traversed the allegation that Underhill was the party beneficially interested in the judgment, and must have succeeded on the evidence. In *Hiscocks v. Jones*, the party enticed the prisoner out of the rules; here it merely appears that Underhill learned that the prisoner was out of the rules, and then executed his writ. He had a right to do so, even if he watched for the opportunity. The marshal was liable for the escape the moment Wright was out of the rules. The law, indeed, allows the marshal, by way of excuse, (not by way of negating the escape,) to show that he had the prisoner in custody at the time of the commencement of the action for the escape. But here it is not denied that Wright, without any fraud on the part of the plaintiffs or their agents, was without the rules; and the charge, if fully proved, would merely show a concerted plan to prevent the marshal from relieving himself from an action to which he was actually liable. That, at the utmost, would be ground only for a cross action. But there is no evidence that Lefevre was not a bona fide creditor. The plea alleges that the plaintiffs knew that Wright had the privilege and benefit of the rules: but in fact he was out of the rules, and could be in the enjoyment of no privilege whatever.

Sir *John Campbell*, Attorney General, and *Petersdorff*, contra. The conspiracy charged is not a criminal conspiracy, strictly speaking: the allegation substantially asserts no more than the privy of the plaintiffs to the trick. Upon this issue it is not incumbent to prove a technical conspiracy, any more than a plaintiff in assumpsit is bound to support the common words of the breach by proving a contrivance and fraudulent intention. On the evidence it is clear that Underhill was a party to a contrivance to deprive the marshal of the defence which the law

(a) Before Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

allows him. If that was the purpose of the arrest, whether or not at the suit of a bonâ fide creditor, no person privy to the arrest has a right to complain of the escape. The privy of the plaintiffs to Underhill's acts is shown by Underhill being a party really interested in the judgment at the suit of the plaintiffs. Even if that were not so, there was clear evidence that the plaintiffs adopted Underhill's act. His act is, therefore, their's; and the issue is substantially proved by the defendant. It would have been enough if the plea had alleged only that the plaintiffs procured Wright to be arrested without the rules for the purpose of defeating the marshal's defence: the allegation of a conspiracy is surplusage. Thus, the personal presence and concurrence of one of the plaintiffs in the arrest would have been conclusive evidence in support of the plea, though it would not have supported a technical charge of conspiracy by the two plaintiffs. [PATTERSON, J. An allegation that a sheriff has obtained a bond fraudulently may be supported by proof that his agent has done so, though the sheriff is not personally privy to the fraud.] (a)

Cur. adv. vult.

Lord DENMAN, C. J., in the vacation after this term, (13th June,) delivered the judgment of the Court.

The facts in this case are so plain, and show the nature of the transaction so clearly, that no one who attends to them can doubt that the whole was a trick and contrivance on the part of Mr. Underhill to fix the marshal with an escape.

The question is, whether the acts of Underhill were the acts of the plaintiffs. On the 26th of August Wright was in custody, (*i. e.* having the benefit of the rules,) at the suit of the plaintiffs in execution, and at the suit of Underhill and others on mesne process. He is arrested on mesne process at the suit of Lefevre, by the orders of Underhill, whilst out of the rules; and he is kept out of the rules against his will until Underhill himself, with an attorney's clerk, fetches the writ in this action, and also a writ at the suit of Underhill and others for the escape: and the marshal is served with them: after which Wright is brought back within the rules.

The plaintiffs in this action adopt the act of Underhill in so procuring the writ; for they go on to declare and prosecute the suit: and it surely was a question for the jury, whether they did not, by such adoption, make themselves parties to the whole of Underhill's trick and contrivance.

Two letters were in evidence, one of the 10th March, 1836, from Wright to one of the plaintiffs; the other, the answer on the 24th March. The defendant wished to infer from them that Underhill was the party really interested in the judgment obtained by the plaintiffs: but, on attending to the language of them, though they show an intimate connection between Lefevre and the plaintiffs, their direct reference is, not to that judgment, but to a threatened arrest on the bill held by Lefevre, and on which the arrest in August afterwards took place.

But the circumstances under which, and the persons by whom, the writ in this action was sued out, form adequate ground for charging the plaintiffs with collusion and trick; and surely the jury might well hold that they were parties to it.

Rule absolute.

In this term, *Kelly* obtained a rule for entering judgment for the

(a) See *Raphael v. Goodman*, 8 A. & E. 565, (35 E. C. L. R. 455.)

plaintiff, non obstante veredicto. (a) In the Michaelmas vacation following, (28th November, 1839.)

Sir *John Campbell*, Attorney General, and *Petersdorff*, showed cause. The plea shows that the plaintiffs, by their own fraud, prevented Wright from returning in time to save the escape: they, therefore, have no right to complain of the escape. All escapes are negligent, except those which are voluntary, or which happen by the act of God or of an enemy. Thus, an escape which results from the prison being demolished by rioters is negligent. (b) On a negligent escape, if the sheriff retake before action brought, it is an answer; *Rigeway's Case*, 3 Rep, 52 a: (c) which, by stat. 8 & 9 W. 3, c. 27, s. 6, must be specially pleaded. A voluntary return by the prisoner may be also pleaded, being equivalent to a recaption; *Bonafous v. Walker*, 2 T. R. 126; *Chambers v. Jones*, 11 East, 406. Here, therefore, the plaintiffs have prevented that which would have negatived the complaint; and it is as if they had actually contrived the escape in the first instance, in which case they could not have recovered; *Hiscocks v. Jones*, Moo. & M. 269, (22 E. C. L. R. 303.) So leave and license would be a good plea. Besides, it appeared that Wright was an attorney; the arrest was therefore illegal, since he was privileged. (d)

Kelly (with whom was *Ogle*) contra. At the time of the alleged arrest under the writ at the suit of Lefevre, there was a complete cause of action; note (1) to *Jones v. Pope*, 1 Wms. Saund, 35 a. Then it is said that the plea shows that, but for the act of the plaintiffs, fresh facts would have taken place which would have constituted an excuse. That, however, would show only that the plaintiffs were liable to a cross action, or possibly to an indictment. But the plea does not show that Wright would have returned before the action was brought. It alleges only that, at the time of the arrest, Wright intended to and was about to return within the rules, and that, had he not been so arrested, he *could* (not *would*) have returned before the commencement of the suit. The intended return might, had there been no arrest, have taken place, consistently with this plea, a month after the commencement of the action. In *Regina v. Brownlow*, 11 A. & E. 119, it was held that the word "instantly," in a coroner's inquest, was not equivalent to "then." The allegation that the plaintiffs kept and detained Wright without the rules, during such time as was required to enable the plaintiffs to sue out their writ, is equally indefinite. [PATTERSON, J. The conspiracy, as alleged, was to procure the arrest, not to detain for any time. COLERIDGE, J. Consistently with the plea, Wright might have been arrested and released before the time at which he would have returned, had there been no arrest.]

Per Curiam, (e) (stopping *Ogle*.)

Rule absolute.

(a) The rule nisi was entered as of June 12th, 1839, the last day of term, having been granted by the Court at the time (June 13th) of making the former rule absolute, and having been so entered to avoid dating a rule nisi in vacation. In showing cause, the Attorney General suggested that the second rule was obtained too late, under R. Hil. 2 W. 4, l. 65, (3 B. & Ad. 383.) unless there was an implied exception; but Lord Denman, C. J., said that the case was not within the rule. See *Lumby v. Allday*, 1 Tyrwh. 217, and note at p. 225 there.

(b) See *Elliot v. The Duke of Norfolk*, 4 T. R. 789.

(c) See note (B) in Thomas and Fraser's edition.

(d) But see *Byles v. Wilton*, 4 B. & Ald. 88, (6 E. C. L. R. 356.) And see stat. 13 G. 2, c. 13, s. 9.

(e) Lord Denman, C. J., Patterson, Williams, and Coleridge, Ja.

The DUKE of BEAUFORT against WELCH.—p. 527.

Assumpsit on a retainer to project certain works, and to examine certain bills, with care, skill, and diligence. Pleas: 1. Non assumpsit; 2. No retainer; 3. That defendant did use care, &c., in projecting the works; 4. That he did use care, &c., in examining the bills. The cause and all matters in difference were referred by order of Nisi Prius; costs of the cause to abide the event. The award found for defendant on 1st, 2d, and 4th issues, and for plaintiff on 3d. Held, that the award was good, and not repugnant; for that the finding on the 3d and 4th issues must be regarded as hypothetical, and only for the purpose of determining the costs of them; and that it could not be inferred, from such finding, that there was matter in difference in respect of work done, other than the work included in the action.

By an order of nisi prius at the Gloucester assizes, July, 1838, a verdict was taken in the above cause for 2000*l.*, subject to the award of C. W., to whom it was referred, "to settle the cause and all matters in difference" between the parties; the arbitrator to have the same power as a judge to certify as to costs, and to order and determine what he should think fit to be done by the parties respecting the matters in dispute; the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator.

The declaration in the action contained a special count in assumpsit on a retainer of defendant by plaintiff to project and design certain apparatus for warming plaintiff's house with warm water, to superintend the fixing of it, to examine the bills of the persons employed to fix it, and to certify their reasonableness; and it alleged a promise to use due care, skill, and diligence in and about the premises. Breach, that defendant did not use due care, skill, or diligence, &c., with an allegation of special damage. Counts for money had and received, and account stated. Pleas: 1. Non assumpsit. 2. Denial of the retainer alleged in the first count. 3. As to part of the first count, that defendant did use due care, skill, and diligence in and about projecting and designing, and superintending the fixing of the apparatus. 4. As to other part of the first count, that he did use due care, &c., in examining the bills of the persons employed. 5. As to the money counts, a set-off.

The arbitrator directed, by his award, that a verdict should be entered for defendant; that the first, second, and fourth issues should be also found and entered for him; and that the third and fifth issues should be found and entered for plaintiff.

In last Easter term, *Ludlow*, Serjt., on the part of the plaintiff, moved to set aside the award, and obtained a rule nisi on the ground, among others, that the award was inconsistent and contradictory in finding the first, second, and fourth issues for defendant, and third and fifth for plaintiff; and that there were matters in difference which were left unsettled. (a)

Talfourd, Serjt., and *R. V. Richards* now showed cause. As the costs are to abide the event, it was necessary for the arbitrator to find upon every issue, in order that the costs of each might be distinguished. The effect of the finding is, that there was no such contract by, or retainer of, the defendant as stated in the declaration; but that, supposing there was one, the defendant had failed in the performance of that part of it which obliged him to project and design the apparatus, &c., with care, skill, and diligence, though he had properly examined the bills.

(a) There were affidavits to show that there were other matters in difference before the arbitrator, besides those included in the action; but they were not considered satisfactory by the Court.

Perhaps the defendant may have been retained to carry into effect the project and design of some other person, and therefore could not be said to have used care and skill in projecting and designing the apparatus himself. As to other matters in difference, none are shown.

Ludlow, Serjt., *contrà*. The award is repugnant on the face of it, and therefore bad. If the defendant entered into no contract at all, he cannot have performed any part of it, as is found on the fourth issue. If he improperly performed part of it, as found on the third issue, then there must have been a contract to perform. A traverse, and a confession and avoidance, cannot both be true. If it be said that the works found to be improperly done on the third issue are not the works contracted for, then there must have been some other works not included in the action, and on which no award has been made. If there be any doubt whether the award comprehends every matter submitted, then it is bad, because it leaves a question open to litigation, as appears from the language of *PATTESON*, J., in *In the matter of Tribe and Upper-ton*, 3 A. & E. 302, (30 E. C. L. R. 91.)

LORD DENMAN, C. J. There is no inconsistency. The award shows that there was no contract; but that, if there was one, then one of the alleged breaches of it was proved. So the defendant may have performed the alleged work, yet not have contracted to perform it at all. We cannot infer from the award that there was any other matter in issue.

LITLEDALE, J. It is found that the defendant did use due care and skill in and about a business which he had not contracted to execute. This is possible; for he may have executed it voluntarily and without any obligation to do so.

PATTESON, J. It is sought to set aside the award by inference; but it does not appear under what circumstances the work was done; nor does the plaintiff distinctly show, by affidavit or otherwise, that work was done independently of that in respect of which the action was brought. The declaration charges a retainer, which is negatived by the award. The finding on the remaining issues is material only for the purpose of settling the costs of them. The arbitrator is therefore obliged to find upon them hypothetically. He says that, taking the contract as stated, the defendant, as to the part, performed it, and, as to another part, did not perform it.

WILLIAMS, J. The imputation of negligence in the performance of certain work, as established by the finding on the third plea, does not necessarily imply that the defendant had engaged, or was retained, to perform it with care, skill, and diligence, or that he was employed to do work, other than that included in the action. The finding on all the pleas after the first and second is hypothetical, and only necessary for the purpose of distributing the costs.

LORD DENMAN, C. J. In such cases, it is a rule to discharge with costs

Rule discharged with costs.

The QUEEN against The EASTERN COUNTIES Railway Company.—p. 531.

By a railway act (6 & 7 W. 4, c. cvi., local and personal, public) it was recited, that the making a railway from London to Norwich and Yarmouth, passing by Colchester, &c., would be of great public advantage; and that persons named were willing at their own costs to carry the undertaking into execution. The persons named, with other shareholders, were incorporated into a company to carry the act into execution. They were authorized to raise by shares, 1,600,000*l.*, (which, it was recited, was the probable expense,) and, in case that sum should not be sufficient, to borrow on mortgage, or raise by additional shares, 533,333*l.* The line was set out in the act, describing the places from London through Middlesex, Essex, Suffolk, and Norfolk, with two termini, one at Norwich, the other at Yarmouth. The usual powers to take lands were conferred, with power to deviate from the line to a limited extent. All the 1,600,000*l.* was to be subscribed for, before the company could exercise their compulsory powers; and these powers were to cease, unless executed within two years: and, if the whole work was not completed in seven years, (unless prevented by inevitable accident,) all their powers were to cease, except as to the part (if any) completed. If any part was abandoned, the lands were, as to that part, to vest in the owners of the lands adjoining.

By a second act, (1 & 2 Vict. c. lxxxi, local and personal, public,) two years more were added to the first two years; and the company were forbidden to deviate, unless the line of deviation were set out within one year from the passing of the last act.

On application for a mandamus to the company to proceed with the whole line, setting out deviations, &c., and to purchase the necessary lands, it appearing to the Court that the affidavits showed reasonable ground for believing that the company intended to complete the line from London to Colchester only, and to abandon the rest, the writ was granted, though the company stated that they had not, nor could raise without a new act, funds sufficient to complete the line.

The mandamus suggested that the company had been required to define the deviations, and complete the railway to Norwich and Yarmouth, but that they had refused and neglected to purchase the necessary lands between Colchester and Norwich, and Norwich and Yarmouth, or set out the deviations, or to make and complete the railway. There was no averment that the company had abandoned the design, or were not proceeding with all convenient speed, or that a reasonable time had elapsed without proper preparations, or that deviations would be expedient.

Held, that the mandamus was insufficient.

When cause is shown against a rule for a mandamus, the objection, that no sufficient demand and refusal appear, must be taken before the merits are discussed.

SIR J. CAMPBELL, Attorney-General, in last Easter term, obtained a rule nisi for a mandamus, commanding the defendants to proceed to make and complete a railway from London to Norwich and Yarmouth, passing by Romford, Chelmsford, Colchester, and Ipswich, according to the provisions of an act, &c. (6 & 7 W. 4, c. cvi., local and personal, public,) and another act (1 & 2 Vict. c. lxxxi., local and personal, public,) (a) and especially to set out and define the line of the said railway, par-

(a) Stat. 6 & 7 W. 4, c. cvi., local and personal, public, is "For making a railway from London to Norwich and Yarmouth, by Romford, Chelmsford, Colchester, and Ipswich, to be called 'The Eastern Counties Railway.'" (Royal Assent, 4th July, 1836.)

Sec. 1 recites that "the making a railway from London to Norwich and Yarmouth, passing by Romford, Chelmsford, Colchester, and Ipswich, would be of great public advantage by opening an additional, certain, and expeditious communication between those cities and towns and the intermediate and adjacent towns and districts, and also by facilitating the means of intercourse between the metropolis and the eastern districts of England;" and that "the several persons hereinafter named are willing at their own costs and charges to carry the said undertaking into execution, but the same cannot be effected without the authority of parliament:" and incorporates certain persons named, and all present or future subscribers, their successors, executors, administrators, and assigns, by the name of "The Eastern Counties Railway Company," giving them power to purchase, hold, and sell lands for the use of the undertaking; and enacts that "they shall also have and exercise all other powers and authorities which are hereafter given or mentioned."

Sec. 3 enacts "that it shall be lawful for the said company to raise amongst themselves any sum of money for making and maintaining the said railway and other works by this act authorized, not exceeding in the whole 1,600,000*l.*," to be divided into shares

ticularly that part thereof, lying between Colchester and Norwich, and Norwich and Yarmouth, deviating from the line laid down on the plans in the said last-mentioned act in that behalf referred to; and to proceed to purchase the lands necessary to the making and completing the

of 25*l*. each. Sect. 4 gives the company power to sue subscribers for their subscriptions. Sect. 5 enacts "that the money to be raised by the said company by virtue of this act shall be laid out and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing this act, and all other expenses preparatory or relating thereto, and afterward, the remainder of such money shall be applied in, for, and towards purchasing lands, and making and maintaining the said railway and other works, and in otherwise carrying this act into execution."

Sect. 6 enacts "that it shall be lawful for the said company and they are hereby empowered to make and maintain the railway hereinafter mentioned, with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, or over the lands delineated upon the amended plan, and described in the amended book of reference to be deposited with the respective clerks of the peace for the counties of Middlesex, Essex, Suffolk, and Norfolk, and the town and county of the city of Norwich; (that is to say,) a railway commencing at or near High Street, Shoreditch, in the parish of St. Leonard's Shoreditch, in the County of Middlesex, and to terminate in, at or near Norwich and Great Yarmouth, (that is to say, as regards Norwich, in, at, or near Carrow Abbey Field in or near the city and county of Norwich, and as regards Great Yarmouth, at or near the new suspension bridge in Great Yarmouth aforesaid,) and passing from, through, or into the parishes, townships, and places of Christ Church Spitalfields," &c., "or some of them, all in the county of Middlesex; Low Layton," &c., "certain places named in the borough of Colchester, &c., "or some of them, all in the county of Essex; East Burgholt," &c., "Witheringsett," &c., "or some of them, all in the county of Suffolk; Scole," &c., "or some of them, all in the county of Norfolk; Norwich, Thorpe," &c., "or some of them, all in the city and county of Norwich; Willingham," &c., "and certain extra-parochial lands, or some of them, all in the county of Norfolk." Sect. 7, reciting that, since the depositing of the maps, &c., and books of reference, certain alterations of the line had been agreed upon with the concurrence of owners and occupiers, enacts that maps or plans, describing the line as agreed to be altered, together with amended books of reference thereto, shall be deposited with the said clerks of the peace respectively. Sect. 9 and several following sections give the ordinary powers to take lands, &c., by purchase, or, in default of agreement, on paying sums to be assessed by a jury. By sect. 53 the company could take no building erected before 30th November, 1835, nor any ground then used as a garden, orchard, yard, &c., without the owner's consent, unless specified in the schedule annexed to the act, or omitted by mistake, to be certified as there provided.

Sect. 54 defines the breadth of the railway. Sect. 55 enacts "that the said company in making the said railway and other works by this act authorized shall have full power and authority to deviate from the line delineated on the maps or plans so deposited with the clerks of the peace," with certain limitations as to extent; and no deviation is to be made into the lands of persons not mentioned in the book of reference, or omitted by mistake: such omission to be certified as provided in the act.

Sect. 130, and several sections following, provide for periodical general and special general meetings of the company, and for the method of voting by the shareholders at such meetings. Sect. 138 names the first directors of the company, who are thereby appointed "to manage the affairs of the said company;" five to be a quorum; and subsequent sections provide for the election of successors to them by the shareholders. Sect. 144 enacts "that the directors for the time being of the said company shall superintend all the affairs thereof, and have power to use the common seal of the said company on their behalf, and shall have full power and authority to do all acts whatsoever for carrying into effect the purposes of this act, and for the management, regulation, and direction of the affairs of the said company, or relative thereto, which such company are by this act authorized to do (except such as are herein required and directed to be done at some general or special general meeting of the said company)." Sect. 158 gives power to make, at the general and special general meetings, "such by-laws, orders, and rules as to them shall seem expedient for regulating the proceedings, and remunerating and reimbursing the expenses of the directors, and for the good government of the officers and servants of the said company, and for the management of the said undertaking in all respects whatsoever."

Sect. 159 gives the directors power to make calls, not exceeding 8*l*. per share, at intervals of not less than three months, and on notice of at least twenty-one days; and provisions are made for enforcing the calls. Sect. 174 authorizes the public to use the railway on payment of certain tolls, and in conformity with regulations, to be determined as there and in subsequent sections specified. Sect. 177, and sections following, give the company

said railway, and lying between Colchester and Norwich, and Norwich and Yarmouth aforesaid, pursuant to the provisions of the said several acts.

The rule was obtained on the affidavit of Charles Symonds and others.

power to carry goods and passengers at such charges for carriage as they shall determine upon, in addition to the tolls, &c., before authorized.

Sect. 220. "And whereas the probable expense of making the said railway and other works hereby authorized will amount to the sum of 1,600,000*l.*, and the sum of 1,800,000*l.* and upwards, or upwards of four-fifths thereof, has been already subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for; be it therefore enacted, that the whole of the said sum of 1,600,000*l.* shall be subscribed for in like manner before any of the powers given by this act in relation to the compulsory taking of land for the purposes of the said railway shall be put in force." Sect. 221 enacts that a certificate of a justice shall be evidence that the 1,600,000*l.* has been subscribed.

Sect. 222 enacts "that unless the said company shall within the space of two years, to be computed from the passing of this act, agree for or cause to be valued and paid for as herein mentioned the lands which they are by this act empowered to take or use, or so much thereof as shall be by them deemed necessary and proper for the purpose of making the said railway and other works hereby authorized") with an exception specified), "then and from thenceforth the powers which are hereby granted to them for compulsorily requiring, taking, or using such lands shall cease and be utterly void (save and except with the consent in writing of the owners and occupiers thereof respectively)." Sect. 223 enacts "that in case the said railway and works shall not have been made and completed (unless prevented by inevitable accident) within the space of seven years, to be computed from the passing of this act, then from and after the expiration of the said term of seven years all the powers, authorities, and privileges given by this act shall thenceforth cease and determine, save only and except as to so much (if any) of the said railway and works as shall be declared and certified to have been completed within the said term by the justices of the peace of the said counties of Middlesex, Essex, Suffolk, and Norfolk, and the said town and county of the city of Norwich, or any one of them, assembled at any general or quarter sessions of the peace to be holden in and for the said counties or any of them at any time before the expiration of the said term of seven years, or within six calendar months next after the expiration thereof."

Sect. 246 enacts "that in case the money by this act authorized to be raised by subscription, as hereinbefore mentioned, shall be found insufficient for the making, completing, and maintaining of the said railway and other works by this act authorized to be made, and for defraying all necessary charges and expenses relating thereto or for the purposes of this act, and the said company shall be desirous of raising a further and additional sum of money, it shall be lawful for the said company, by an order of any general or special general meeting thereof, to borrow and take up at interest any such further or additional sum, not exceeding in the whole the sum of 533,333*l.*, on the credit of the said undertaking, as to them shall seem meet and convenient; and the said company or the directors thereof, after an order shall have been made for that purpose at any general or special general meeting of the said company, are hereby authorized and empowered to mortgage and assign the property of the said undertaking, and the rates, tolls, and other sums arising or to arise by virtue of this act, or any part thereof." (paying the costs of the assignment out of the tolls, &c.), "as a security for any further sum of money to be borrowed as aforesaid, with interest, to such person as shall advance the same." The same section and following ones, lay down provisions for enabling the mortgagees to avail themselves of the securities. Sect. 252 empowers the company to raise any part of the additional sum by new shares, in augmentation of their capital, instead of mortgage.

Sect. 254 enacts "that if the railway or any part thereof shall at any time hereafter be abandoned or given up by the said company, or after the same shall have been completed shall for the space of three years cease to be used and employed as a railway or otherwise as authorized by this act, then and in such case the lands so authorized to be and so purchased or taken by the said company for the purposes of this act, or otherwise the parts thereof over which the said railway or any part of such railway which shall be so abandoned or given up by the said company shall pass, revert to and vest in the owners for the time being of the land adjoining," under regulations specified in the act.

Stat. 1 & 2 Vict. c. lxxxi. (local and personal. public) is "to amend and enlarge the powers and provisions of the act relating to the Eastern Counties Railway." (Royal Assent, 27th July, 1838.)

Sect. 1 recites the passing of stat. 6 & 7 W. 4, c. cvi., and enacts that all its powers,

Symonds stated that he was owner of a farm and lands in Suffolk; that the lines laid down in the amended plan mentioned in sect. 7 of stat. 6 & 7 W. 4, c. cvi., intersected his farm and lands; that his name was mentioned in the amended book of reference referred to in the same section, as owner or reputed owner thereof; and that his farm and lands were specified in the schedule referred to in sect. 53, as belonging to him, and were therein described as "farm, cottage, yard, and barn, orchards and garden." That, at the expiration of two years from the passing of the act, namely, on 4th July, 1838, the company had not agreed for, or caused to be paid for, deponent's property, or, to the best of his knowledge or belief, any of the other properties specified in the schedule, situated in Suffolk and Norfolk, saving the properties of a few persons, who, with one exception, were agreed with before the act passed. He then referred to stat. 1 & 2 Vict. c. lxxxi., and stated that the year allowed thereby for setting out and defining the line was now very near expiring, and that the line had not yet been set out or defined, so far as regarded his property at least, by any visible landmarks, &c., according to the usual practice; and that he had been informed and believed that the line had not been set out, &c., in any manner, in respect to any of the other property specified in the schedule, situated in Suffolk and Norfolk. That the company had not yet agreed for, or caused to be paid for, the portion of his property required for the railway, or made any proposal to him; and that, to the best of his knowledge and belief, they had not yet agreed for, or caused to be paid for, any of the other lands required for the railway in Suffolk and Norfolk, excepting as aforesaid. That deponent offered no opposition to either act, from a belief that the communication to be established by the railway between Norfolk and London would be a great benefit to himself, as the owner of land, and to the whole county of Norfolk, as well as the other counties and districts which the railway was designed to intersect. That he was suffering great inconvenience and prejudice in the possession and enjoyment of his property, from the uncertainty of the line which the railway was to take: and that he was informed and believed that, unless the line, as described in the plan deposited with the clerks of the peace, (under stat. 6 & 7 W. 4, c. cvi. s. 7,) were carefully revised, and many needful deviations fixed and determined, and the whole line, or considerable portions thereof, fixed and defined anew, before 27th July, 1839, it would be difficult or impossible to carry out the railway through Suffolk and Norfolk, according to the line originally laid down. That he had been informed and believed that, of the capital of 1,600,000*l.*, which the company were authorized to raise among themselves, (stat. 6 & 7 W. 4, c. cvi., s. 3,) 600,000*l.* had already been paid up, and that the company had also borrowed considerable sums, and had therefore ample means

provisions, &c., shall extend to the present act, and the purposes and things thereby authorized or required to be done, as if therein re-enacted.

Sect. 2 enacts "that the time by the said recited act limited for the compulsory purchase, taking, or using of lands for the purpose of the said undertaking shall be and is hereby extended and enlarged for the further term of two years, to be computed from the expiration of the period for that purpose limited by the said recited act: provided always, that after the expiration of one year from the passing of this act it shall not be lawful for the said company to deviate the centre line of the said railway as laid down on the plans thereof referred to in the said recited act, unless the said company shall at the expiration of the said period have set out and defined their line deviating from the line laid down on the said plans as aforesaid, and in such case the line so laid down and defined shall be the line to be adopted by the said company without deviation therefrom."

of defraying the expense of setting out and defining the whole line from London to Norwich and Yarmouth, and paying for all the properties required for it: but that they had expended all that had come into their hands on the part of the line between London and Colchester, excepting sums, not exceeding £500L., paid for lands in Norfolk and Suffolk. That the deponent had been informed and believed that the company had entered into several large contracts for the completion of the line between London and Colchester, and for providing a carrying establishment for the working thereof when completed, and that they were about to enter into other contracts for the same purposes; but that they had not yet been able to make, nor did they contemplate making, any provision for setting out, executing, or working the line beyond Colchester; and that it was the intention and determination of the company not (unless compelled) to carry the railway farther than Colchester. That deponent consented to the enlargement of the company's power under stat. 1 & 2 Vict. c. lxxxi. s. 2, on the faith that the line would be set out and defined, and that the parts of his property required for the railway would be paid for, within the enlarged time.

There were also affidavits by other parties, including proprietors, containing statements to show that stat. 6 & 7 W. 4, c. cvi., was obtained upon evidence, in part, of the advantages which would accrue to Norfolk and Suffolk from the completion of the railway; and that the concurrence of parties in Norfolk and Suffolk was given upon the understanding that it should be carried through those counties; and it was stated that a scheme for making a different railway from London to Norwich had been abandoned in favour of the scheme of the present defendants. There was also an affidavit by a civil engineer, stating that he had had great experience in railways, and never knew an instance of a railway of any considerable extent being executed without numerous deviations being found requisite from the line originally laid down; that, from his knowledge of the line laid down for the Eastern Counties Railway, it was highly probable that numerous deviations therefrom, within the limits laid down by the acts, would be necessary; and that, in order duly to set out and define such deviations by the 27th July next, it was in his opinion absolutely necessary that the setting out and defining the same should be commenced without delay.

Other statements were added to show a demand and refusal; and that the company had, in effect, abandoned the intention of carrying the railway beyond Colchester.

In answer, one of the directors made affidavit that he was advised and believed that the power to make deviations rested in the discretion of the directors. That he had been informed by the engineer of the company, and believed, that, in making the line through Suffolk and Norfolk, deviations would not be necessary. That the directors had proceeded in the execution of their powers to the best of their judgment and ability. That they believed the best course, for the advantage of the shareholders and public at large, to be, to make the line continuous from London to the interior of the districts through which the railway was to pass, finishing and opening portion by portion, as in their judgment might be best calculated to promote the prosperous issue of the undertaking, and the interest of the shareholders and the public. That they intended opening the line from Romford during the present June, (1839,) and to proceed in making the line between Romford and Chelmsford. That it was

customary for the directors of railway companies to apply, from time to time, to parliament for an extension of time. That deponent, from his own knowledge, believed that the company would not be able to complete the line without raising further sums by the authority of parliament. That he believed it would be imprudent to purchase further lands, inasmuch as all the available funds would be employed with more benefit to the public in completing the works already in hand, and extending them over the lands already purchased. That, to purchase further lands, it would be necessary to apply to parliament (first obtaining the consent of the shareholders) for power to raise more money by loan or otherwise. That, if the directors were interrupted in gradually completing the line from London towards the interior of the districts, the works at present in operation between London and Colchester must certainly be discontinued. Statements were added to show that the plan at present contemplated by the directors was generally approved of by the shareholders.

The engineer of the company deposed that, although deviations from the line of railway were frequently made, and some had been made in the Eastern Counties Railway, and others might be advisable, yet none would be necessary: and that it would not be difficult to carry out the railway to Suffolk and Norfolk in the precise line laid down.

Sir *F. Pollock*, *Alexander*, and *Austin*, now showed cause. (a) There is no precedent for such an application as this; and the facts show no obligation upon the company. Sect. 6 of stat. 6 & 7 W. 4, c. cvi., describes the termini, Shoreditch on the one end, and Norwich and Great Yarmouth on the other: but it only gives the company power to perform the work, and does not impose an obligation. *Rez v. The Proprietors of the Birmingham Canal Navigation*, 2 W. Bl. 708, is in point. Sects. 222, 223, show that the framers of the act distinctly contemplated the possibility of the company completing a part only of the railway; and indeed the words "if any," in s. 223, show that the possibility of no part being completed was within the view of the legislature. The compulsory powers are to cease if the railroad be not completed: how could a mandamus issue to command the doing of that which the legislature had incapacitated the party from doing? By sect. 254 provision is made for the abandonment by the company of all or part of the railway. Sect. 246 also shows that the legislature recognised the possibility of the funds not being sufficient for the completion of the work; and, in that case, it is left open to the company whether or not they will raise more money for the purpose. Sect. 222 allows two years (ending 4th July, 1838) for the continuance of the compulsory powers of the company; and in seven years, (on 4th July, 1843,) all their powers are to cease, except as to so much as is completed, (sect. 223;) and, by stat. 1 & 2 Vict. c. lxxxi. s. 2, the continuance of the compulsory powers is enlarged for two years longer, (to 4th July, 1840:) and till the expiration of that time no one is entitled to assume that any part of the work is abandoned; *Lee v. Milnor*, 2 M. & W. 824. Sect. 55 of stat. 6 & 7 W. 4, c. cvi., authorizes a deviation to a certain extent; and this power, by sect. 2 of stat. 1 & 2 Vict. c. lxxxi., ceases on the 27th July, 1839: but it cannot thence be presumed that a deviation is necessary, especially as the affidavits negative this: nor, at any rate, can the company now be called upon to determine what deviations they may find it necessary

(a) Before Lord Denman, C. J., Littledale, Patteson, and Williams, Ja.

to make hereafter. The direction of the affairs of the company, by sect. 144 of stat. 6 & 7 W. 4, c. cvi., is in the hands of the directors: shareholders have a voice in electing the directors, by earlier sections, but cannot control their discretion, otherwise than under the sections relating to general meetings. At any rate, this court will not interfere between the members; *Rex v. The Bank of England*, 2 B. & Ald. 620; *Rex v. The London Assurance Company*, 5 B. & Ald. 899, (7 E. C. L. R.); *Rex v. The Benchers of Lincoln's Inn*, 4 B. & C. 855, (10 E. C. L. R.); *Rex v. Alsop*, 2 Show. 170. Strangers have no right to interfere in any way with the affairs of the company. Some of the deponents are landowners: but, if their land be taken by the company, their interest in it ceases; if not, they are mere strangers. The company cannot be called upon to purchase lands before they want them. The affidavits suggest that the funds are exhausted: but can a mandamus go to compel the company to raise more money? What is the suggestion of the mandamus to be, and what return can be made? In *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646, (a) a company were compelled by mandamus to reinstate the railway which they had taken up, the act there providing that all persons should have free liberty to use the railway: but ABBOTT, C. J., said that the writ should not go to compel the company to maintain the railway, after they had reinstated what they had taken up. And there the company had actually received tolls. Here, as to the part in question, the railway has never been laid down, nor have any tolls been received. No profit can be made till that is done which the mandamus is asked for to compel. This circumstance distinguishes the case from the two cases of *Rex v. Cumberworth*, 3 B. & Ad. 108, (23 E. C. L. R.), 4 A. & E. 731, (31 E. C. L. R.), and from *Rex v. Edge Lane*, 4 A. & E. 723, (31 E. C. L. R.) Further, a mandamus does not lie where there is a specific remedy: and here the statute specifically lodges the discretion in the directors, or in the general meeting, to one of which therefore application should be made. *Rex v. The Paddington Vestry*, 9 B. & C. 456, (17 E. C. L. R.), shows the reluctance of the court to interfere by this writ without absolute necessity. Again, a mandamus will not be granted till there has been a distinct application and refusal; *Rex v. The Brecknock and Abergavenny Canal Company*, 3 A. & E. 217, (30 E. C. L. R.); *Rex v. The Wilts and Berks Canal Company*, 3 A. & E. 477, (30 E. C. L. R.) Here no application and refusal appear.

Sir J. Campbell, Attorney General, Cresswell, Kelly, and O'Malley, contra. It is a recognised principle, that a statute of this kind is to be interpreted as a contract between the public and the company. The act here is for a railway, not from London to Colchester, but from London to Norwich and Great Yarmouth. And, had the undertaking been confined to a railroad from London to Colchester, the act perhaps would not have passed. A party who has a house on the line between London and Colchester may have consented on the ground that he has an estate between Colchester and Norwich, which latter will be benefited by the railway being completed. Indeed, the affidavits show that another plan failed in consequence of the company undertaking the whole. Lord ELDON's language in *Blakemore v. The Glamorganshire Canal Navigation*, 1 Mylne & Keen, 162, applies. The Court of Chancery would prevent the execution of any part of the railroad if it appeared that the

(d) See *Regina v. Gamble*, 11 A. & E. 72, (39 E. C. L. R.)

intention was not to complete the whole. If trespass had been brought for an entry upon the lands by the company, the defendants could not have justified entering for the purpose of making a road from London to Colchester, as is clear from *Rex v. Cumberworth*, 3 B. & Ad. 108.(a) And this court interferences by mandamus, not only where there is an entire absence of other remedy, but also where there is no other remedy capable of giving effectual relief; *Rex v. The Severn and Wye Railway Company*. It is contended that the intention not to complete does not appear till the time is out; but, if so, there could be no mandamus till the act required had become impossible. If there be an intention to perform, and if all steps now necessary have been taken, that may be returned. It is attempted to represent this as merely a dispute between different members of the company: but the affidavits show that the public are interested. The clauses depriving the company of their power after a certain time do not relieve them from their duty to the public. The privileges cease, but not the obligation: and it becomes the more important that the company should be immediately forced to act. The discretion of the directors is not absolute, but must be exercised in conformity with the statute. The cases of refusal by the Court to interfere in matters merely between different members of companies, (as *Rex v. The Proprietors of the Birmingham Canal Navigation*, 2 W. Bl. 708,) have no relevancy here. The want of funds is no answer: the act was obtained on the faith that funds could be obtained, and the company must raise them. Then the application and refusal are sufficient. [Lord DENMAN, C. J. No objection can, we think, be taken to the sufficiency of the application and refusal after the merits have been discussed: that is a point which ought to be raised in the first instance.(b)

Cur. adv. vult.

Lord DENMAN, C. J., in the vacation after this term (21st June) delivered the judgment of the Court.

This was an application for a mandamus to do certain acts therein specified; and it was observed on both sides, in the course of the discussion, and we think with great truth, that the questions involved in it are of much novelty, and of at least equal importance. Because, as, on the one hand, much mischief may ensue if this Court should improvidently enjoin the performance of things impracticable or improper, so, on the other, is there no higher duty cast upon this Court than to exercise a vigilant control over persons intrusted with large and extensive powers for public purposes, and to enforce, within reasonable bounds, the exercise of such powers in compliance with such purposes; and the more so, as we are not aware of any other efficient remedy. The principles upon which these powers are conferred by the legislature upon undertakings of this description are now so fully understood that it is not needful to do more than generally to refer to them. They are thus laid down by Lord ELDON in the well known case of *Blakemore v. The Glamorganshire Canal Company*. "I apprehend those who come for" these acts "to parliament, do, in effect, undertake that they shall do

(a) See *Rex v. Cumberworth*, 4 A. & E. 731, (31 E. C. L. R. ;) *Rex v. Edge Lane*, 4 A. & E. 723.

(b) In *The Queen v. Parrott*, November 11th, 1839, where cause was shown against a rule for an information in the nature of a quo warranto (made absolute November 12th). the same regulation was announced by Lord Denman, C. J., as having been determined upon by the Judges of this Court. The case itself decided no point, and will therefore not be reported at this stage.

and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else:—that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals.”

The same doctrine was acted upon by this Court, in its fullest extent, in the case of *Rex v. Cumberworth*. It remains only to add that these cases and principles have been recently recognised by the Court of Exchequer in the case of *Lee v. Milnor*, 2 M. & W. 824.

The reasons, also, which regulate the practice of this Court in regard to writs of mandamus, are very plain and intelligible. Its interference is occasioned by inferior Courts or persons refusing to proceed in some course prescribed by law, and not in consequence of any misapprehension or error in that course, provided they have entered upon it. And, accordingly, if it had appeared that the company were substantially complying with the terms of their undertaking, there would have been, at once, a satisfactory answer to the application.

Now the objects and purposes for which this company has been incorporated and empowered, or, in the words of the passage cited, what the legislature has empowered and compelled them to do and to submit to, are too clear to admit of any doubt. The title of the act itself “for making a railway from London to Norwich and Yarmouth,” the benefits recited in the preamble as likely to result from opening a communication, not only between the towns there more particularly enumerated, but also between the metropolis and the eastern districts of the kingdom, from which it is alleged that “*great public advantage*” would result, the eastern terminus being a sea port of greater consequence than any in those eastern districts, together with a minute description of the whole line, and a particular enumeration of all the places through which it is to pass, precludes all question on this matter.

We consider it to be equally undeniable that to carry the railroad through a portion only of the described line, such as a third or a half, is a nominal, and not a real, compliance with the meaning of the act of parliament.

We are aware that we were met, in this part of the argument, by remarks upon the difficulty or impossibility attending the execution according to the prescribed terms. We confess, however, that we should have felt more pressed by observations of this nature if we had not observed in the preamble of the act, which we must consider to have been proved, that certain persons therein named (and we consider the obligation as extending to their successors who, from time to time, may constitute the company) were “willing at their own costs and charges to carry the said undertaking into execution.” Such difficulties, be they more or less, should have been duly estimated before the undertakers pledged themselves to the execution for the sake of obtaining such large and extensive powers as most certainty are vested in them for the purposes already mentioned. It was urged, also, that the time for completing the work is not yet elapsed, and the time for determining their line not yet arrived. We were also referred to parts of the act, (and particularly to the clause revesting the land taken for the line in the proprietors on each side,) as indicating that the non-completion of the work was obviously within the contemplation of the legislature.

We think, however, that a failure of the enterprise upon experiment and trial (which may, of course, happen to any scheme, however plausible or promising) is widely different from a design to abandon one part of the line and to execute another which it may be found more easy and profitable to accomplish.

Another argument against our interference was drawn from the power given to a general meeting of the company to decide upon the expediency of all measures to be adopted for executing the act of parliament. But we must consider the real nature of this application. It is not a complaint by the majority of the proprietors against the governing body, but by a minority against the conduct of the company itself, which they charge substantially with a breach of faith towards them by stopping short of a bona fide execution of that purpose which induced them to become subscribers. They strongly urge upon us the consideration that all the sacrifices which they have made in furtherance of their own interests may go unrequited, or even may entail upon them additional loss by giving advantages, in which they cannot share, to their competitors in turning property to account. To say that a majority of the whole body are satisfied with the dividends they now receive, and unwilling to risk more expenditure, is obviously no answer to them, or to the public which created these great powers for different purposes, or to parliament which was induced to grant them by the promise of public benefits much more extensively diffused.

We now come to consider whether, so far as appears to us, there be a bona fide purpose of completing the work. And, upon this part of the case, after making every possible allowance for the discretion to be exercised by the company as to the different degrees of exertion to be made in different parts of the line, it is impossible not to be forcibly struck by the different state of things beyond Colchester, and between that town and London. Beyond, we can discover no activity: whereas between London and Colchester we are given to understand that the whole line is in a state of great forwardness. The procuring land for the line is usually, we believe, as reasonably might be expected, the first step in these cases. And yet, in this preliminary measure, the preparation beyond Colchester we perceive to be comparatively small and insignificant. Moreover, when we consider how indispensable for purposes of this description is the compulsory power of procuring land, (because without it the obstinacy or caprice of a single individual may put a stop to the work at once,) we cannot help thinking that the answer of the company to a request "that they would set out and define their line deviating from the line laid down in the plans," (a mere precautionary measure to secure compulsory purchase,) "that no deviation is necessary," is much more consistent with a determination not to proceed, than a well founded belief that the original plan could have been laid down with such perfect accuracy as, in working, to require no deviation at all.

Upon the whole, without coming to any final decision, we think the case is involved in sufficient doubt to require a return to the mandamus; and that the writ should go for that purpose. Rule absolute.

The mandamus issued, tested 12th June, 2 Vict. (1839.) The suggestion was as follows.

Whereas, by an act, &c., (stat. 6 & 7 W. 4, c. cvi.,) it is amongst other things recited that, &c., (referring to sects. 1, 6, 9, &c.;) and whereas

by another act, &c., (stat. 1 & 2 Vict. c. lxxxii.,) it is amongst other things enacted and provided, &c., (referring to sect. 2:) the writ then suggested that the said persons so named or described in the said first-mentioned act, and so incorporated, did take upon themselves the execution of the said two several acts of parliament, and of the several powers and provisions therein respectively contained; and that, in pursuance thereof, they had purchased lands for the use of the said undertaking, and had begun to make, and in part had completed, the said railway between London and Colchester, but that they had not made any sufficient provision for setting out, executing, or working the line of the said railway beyond Colchester, or in Norfolk and Suffolk. That one Charles Symonds, of the town of Great Yarmouth in Norfolk, was the owner of a certain farm, cottage, yard and barn, orchards and garden, situate in the parish of Witheringsett in Suffolk, which were described in the schedule to the first-mentioned act of parliament, and through which said farm and lands the centre line of the said railway, as laid down in the plans thereof referred to in the said first-mentioned act, ran. And that he "has required you, the said Eastern Counties' Railway Company, to set out and define the line of the said railway deviating from the line laid down on the plans in the said last-mentioned act in that behalf referred to, and to proceed to make and complete the said railway from London to Norwich and Yarmouth; yet you, well knowing," &c., "but not regarding," &c., "have absolutely refused and neglected, and still do refuse and neglect, to purchase the lands necessary to the making and completing the said railway, and lying between Colchester and Norwich, and between Norwich and Yarmouth aforesaid, or to set out and define the line of the said railway, deviating as aforesaid, or to make and complete the said railway according to the provisions of the said act of parliament. In contempt," &c., "and to the great damage of the said Charles Symonds, and to the manifest injury of his estate," &c.

The writ then commanded the company "that, immediately after the receipt of this writ, you do proceed to make and complete a railway from London to Norwich and Yarmouth, passing by Romford, Chelmsford, Colchester, and Ipswich, according to the provisions of the said act of parliament," &c., "and of the said other act," &c., "and especially that you set out and define the line of the said railway, particularly that part thereof lying between Colchester and Norwich, and Norwich and Yarmouth, deviating from the line laid down on the plan in the said last-mentioned act in that behalf referred to. And that you proceed to purchase the lands necessary to the making and completing the said railway, and lying between Colchester and Norwich, and Norwich and Yarmouth aforesaid, pursuant to the provisions of the said several acts of parliament in that behalf contained. Or that you show us cause," &c.

Return (of 2d November, 1839.) "That the said Charles Symonds has not required us to set out and define the line of the said railway deviating," &c., "and to proceed to make," &c., "in manner and form," &c. "That we have set out and defined the line of the said railway, particularly that part thereof lying between Colchester and Norwich, and Norwich and Yarmouth, deviating from the line laid down on the plans in the said act of parliament in the said writ first mentioned, and in that behalf referred to, pursuant to the provisions of the said several acts of parliament in that behalf." "That we" "have, from the time of the passing of the said act of parliament in the said writ first men

tioned hitherto, exercised a reasonable discretion, option, and judgment, in making and completing the said railway, and in compulsorily requiring taking, using, agreeing for, or causing to be valued and paid for, all and every of such lands as we are by the said act of parliament in the said writ first mentioned empowered to take or use as aforesaid. And that we have, in exercise of such reasonable discretion, option, and judgment as aforesaid, proceeded to make and complete, and have made and completed, certain large portions of the said railway, and have purchased, as well all and every of such lands as are necessary to the making and completing the said railway and other works by the said last-mentioned act of parliament authorized between London and Colchester, in the county of Essex, as also a certain large portion of the lands which are necessary to the making and completing the said railway and lying between Colchester and Norwich, and Norwich and Yarmouth, which said last-mentioned lands are all of the lands so lying between Colchester and Norwich, and Norwich and Yarmouth, which we," "in the exercise of such reasonable discretion, option, and judgment as aforesaid, and in execution of the powers of the said several acts of parliament respectively in the said writ mentioned, and for the purposes thereof, have deemed expedient and proper to purchase before and at the time of the issuing of the said writ of mandamus, or at any time since, for the purposes of making the said railway and other works by the said acts of parliament authorized."

"That, in execution and in pursuance and by virtue of the powers and provisions of the said act of parliament in the said writ first mentioned, and for the purposes of making and maintaining the said railway, and other works by the said last-mentioned act authorized, and before and at the time of the issuing of the said writ of mandamus, divers subscriptions, calls, and sums of money had been subscribed and paid up to us by the several persons who have at any time subscribed, or agreed to advance or pay any moneys, for or towards the making and maintaining the said railway and other works by the said last-mentioned act authorized. And that we had also, for the purposes last aforesaid, before and at the time of the issuing the said writ of mandamus, borrowed and taken up at interest, on the credit of our said undertaking, a certain other sum of money; and that we had also, in divers ways and at divers times before and at the time of the issuing of the said writ of mandamus, received, to and for the use and benefit of our said company, divers other sums of money; which said several sums of money, so raised, borrowed, taken up, and received respectively, as aforesaid, amount together to a large sum of money, to wit, the sum of 953,045*l*." That we "have partly laid out and expended and applied the said sum of money last mentioned in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing the said last-mentioned act, and all other expenses preparatory or relating thereto, and partly in, for, and towards purchasing a certain large portion of the lands which we are by the said last-mentioned act of parliament empowered to take or use; and partly in making and maintaining the said railway and other works, and in otherwise carrying the said acts into execution: and that the residue of the said sums, so raised, borrowed, taken up, and received respectively as aforesaid, amounting to a certain small sum of money, to wit, the sum of 9892*l*., now remains in our hands undisposed of, unused, unappropriated, unapplied, and ready to be laid

out and expended and applied in making and maintaining the said railway by the said acts authorized, and in otherwise carrying the said acts into execution: which said last-mentioned remaining sum, together with the residue of the moneys which we are by the said acts of parliament empowered and authorized to raise, borrow, and take up, demand, or receive, for the purpose of making and completing the said railway, is wholly inadequate and insufficient for the purchase of the lands necessary to the making and completing the said railway lying between Colchester and Norwich, and Norwich and Yarmouth aforesaid, and for the making and completing the said railway in the said writ mentioned. And for these causes and reasons we, the said Eastern Counties Railway Company, have not proceeded to make and complete," &c., "according to the provisions of the said statutes in the said writ mentioned, in manner and form as by the said writ we are commanded."

In the following Trinity term(a)

Sir *J. Campbell*, Attorney-General, moved, on concilium, to quash the return, and for a peremptory mandamus. First, the mandamus shows a duty not performed by the company, who were bound, if they commenced the work, to complete it; and the only effectual remedy which Symonds can obtain is a peremptory mandamus. (On these points, he referred to the authorities cited in moving to make the rule absolute.) Next, the return furnishes no answer. It alleges that Symonds had not required the company to do the acts: but that is an objection which can be raised only against granting the rule for a mandamus. The damage done to Symonds is not traversed. Then the company return, in substance, that they have performed as much as, in their discretion, they think proper to perform. But they have no discretion at all as to completing the railway which they have commenced: the mode of execution, and other matters not involving the question whether the railway be or be not completed, may be in their discretion; but nothing more. It is true that in *Rex v. The Ouze Bank Commissioners*, 3 A. & E. 544, it was suggested by some of the learned Judges that the return might have been sufficient if it had alleged that the commissioners thought certain things necessary, and had done them. But there, although a discretion was lodged in the defendants, a peremptory mandamus was awarded. And it was held that the word "forthwith," in the mandamus, meant that the defendants were to set about the works directly, and do what they could; the performance of which should appear by the return. Here it is not pretended that the company have done all they can do. The defendants return that from subscriptions, calls, loans, and other sources, they had, before the writ issued, raised 953,045*l.*, of which all has been expended on the undertaking except 9892*l.*; which last sum, together with all that they are authorized to raise, borrow, &c., is insufficient for completing the railway as commanded by the writ. Now sect. 3 of stat. 6 & 7 W. 4, c. cvi., authorizes them to raise 1,600,000*l.* by shares. The whole of this must have been subscribed for, (sect. 220,) and the fact certified, to enable the company to exercise their compulsory power of taking lands. By sect. 246 they may raise, in addition, 533,333*l.*, on the credit of the undertaking, or (sect. 252) by increase of capital. The main allegation in the return suggests no traversable fact: for how could issue be joined on the question whether what remains of the 2,133,333*l.* would suffice for the completion of the

(a) June 10th, 1840. Before Lord Denman, C. J., Littleale, Patteson, and Williams, J.

railway? But, further, it is not competent to the company to allege the insufficiency of their means. By sects. 1 and 3, they, in effect, engage to complete their work with the 1,600,000*l.*; at any rate they are pledged to complete it with the 2,133,333*l.* If these funds be insufficient, the company is bound to raise so much as will suffice: *Rex v. The Commissioners for improving Market Street, Manchester*, (a) *Rex v. Mayor of Wells*, 4 Dowl. P. C. 562. (b) In *Rex v. Round*, 4 A. & E. 139, a return was held good which showed the impossibility of performing what the writ commanded; but the impossibility was there shown, not, as here, by averring facts inconsistent with the original duty, but by denying the suggestion in the writ upon which alone the duty could be founded at the time when the writ issued. And even that case has been questioned in this Court on some points. (c)

Sir W. W. Follett, contra. The prosecutor might have traversed this return; or, if he meant to question its sufficiency, he might have demurred; and then the whole question of law, including that upon the goodness of the mandamus itself, might have been carried up to a court of error. [PATTESON, J. In *Rex v. The Lord of the Manor of Oundle*, 1 A. & E. 297, a concilium was deemed to be the proper way of raising the question of law.] The decision there was that, after the award of a peremptory mandamus, the Court would not compel the prosecutor to demur to the return. It seems, however, that the officers of this Court consider that error would not lie on a judgment upon such a demurrer. (d)

This mandamus cannot be supported. The statute is permissive, not imperative; and the mandamus can command no more than the defendants can perform. The funds can be raised only by subscription or loan: but the company have no power to compel parties either to subscribe or to lend money. And, till the subscriptions reach the amount of 1,600,000*l.*, there is, by sect. 220 of stat. 6 & 7 W. 4, c. cvi., no power of proceeding. The mandamus does not suggest that the subscription has reached this sum, and shows no power in the company. (He went into other arguments, which had also been urged against the rule.) It is contended that the company are estopped from alleging that they have no funds; and it is true that, as a matter of evidence, a party may be bound by his own admissions, express or implied: but, when the question is whether he is to be ordered to do a thing, the Court must look at the actual state of facts, to ascertain whether the thing commanded be possible or not. The return here expressly states the inability of the company, for want of funds. A mandamus issues to compel the performance of that which a party ought to do and can do: not to punish him for not having done that which he ought to have done, but now cannot. If the company have failed in their duty, they are liable

(a) Note (a) to *Rex v. The Hungerford Market Company*, 4 B. & Ad. 883.

(b) The Attorney General referred also to a case of *Regina v. The Commissioners of the South Level Drainage and Navigation for the South Level of the Fens*, in which the Court made the rule for a mandamus to perform certain works absolute, though there were affidavits that the defendants had not sufficient funds. Trin. Term, 1838, June 11. Not reported. The Court, in making the rule absolute, merely said it would be better that a return should be made. Sir W. W. Follett stated, on the present argument, that the commissioners there had power to tax individuals; but this fact was disputed. The reporters have not found that any return was made to the mandamus.

(c) See *Regina v. Payn*, Easter term, 1840: post.

(d) Stat. 9 Ann. c. 20, s. 2, enables the prosecutor to plead to, or traverse, the return; and the party making the return to reply, take issue, or demur.

to indictment: *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646, has been doubted. (a) [LITLEDALE, J. An indictment would merely act by way of punishment.] The same may be said of a peremptory mandamus, if disobeyed. It is not uncommon for parties to obtain an act of parliament, and then not avail themselves of it; but it never was before attempted to force them by mandamus to use their powers. Where the funds are insufficient, the Court of Chancery will restrain the undertakers from proceeding; how then can this Court command them to proceed? In *Mayor, &c., of King's Lynn v. Pemberton*, 1 Swanst. 244, it was held that commissioners, authorized by statute to perform certain works to which they were to appropriate certain funds, might cut through land of *their own*, while their funds were insufficient to complete the works, and pending an application to parliament for further powers to raise money: but there Lord ELDON said, "The circumstance of their not cutting through your lands distinguishes this case most materially from every other of the kind. In the case of Agar and the Regent's Canal Company, I acted on the principle that where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that the sum is not nearly sufficient, if the owner of an estate through which the legislature has given to the speculators a right to carry the canal, can show that the persons so authorized are unable to complete their work, and is prompt in his application for relief grounded on that fact, this Court will not permit the farther prosecution of the undertaking." In *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472, it was held that, where an act of parliament limited no time for the performance of a work, the undertakers might intermit and resume the works whenever they pleased, and that they were not restricted to what might be held a reasonable time. There, if a mandamus had been applied for to enforce the completion, it is clear that the Court could not have granted it, as they could not interfere with the discretion.

The authorities cited on the other side show that those who possess such powers cannot impose a burthen without performing all the work which is to be an equivalent; but they do not show that the parties can be compelled to proceed. Such are *Blakemore v. The Glamorganshire Canal Navigation*, 1 Mylne & Keen, 154, the two cases of *Rex v. Cumberworth*, 3 B. & Ad. 108, 4 A. & E. 731, and *Rex v. Edge Lane*, 4 A. & E. 723. In *Rex v. The Hungerford Market Company*, 4 B. & Ad. 327, and *Rex v. The Commissioners for improving Market Street, Manchester*, 4 B. & Ad. 333, note (a), commissioners, having bound themselves by notice to a party to take his land, were held incapable of retracting, and a mandamus issued to enforce compensation; but these cases rest on a principle altogether foreign to that contended for; and it cannot be inferred from them that a mandamus would have lain to enforce performance of the work, especially if it had appeared that there were no funds. A corporation having power to hold a court may be compelled to do so by mandamus, though the court has been discontinued for two hundred years; *Rex v. Mayor of Wells*, 4 Dowl. P. C. 562: but there the charter imposed a public duty, which the corporation could not abandon without surrendering the charter. The only attempt like the present was in *Rex v. The Proprietors of the Birmingham Canal Navigation*, 2 W. Bl. 708; and there the mandamus was

(a) See *Regina v. Gamble*, 11 A. & E. 72.

refused; and the utmost length that any of the court went in favour of such applications was to throw out that perhaps a refusal to complete the work from sinister motives might be a ground for a mandamus. *Rex v. The Ouze Bank Commissioners*, 3 A. & E. 544, was decided on the form of the return. *Rex v. Round*, 4 A. & E. 139, proves that a return showing an impossibility is sufficient. The mandamus here does not show that the company have the funds, or power to take lands, or that there has been any unreasonable delay, but simply that no arrangements have been made for carrying on the works, which might have been said the moment the act had passed. Who has the discretion as to the time besides the company? The return shows that the only effect of a peremptory mandamus would be to imprison the parties for life; since the power to complete is entirely negatived. If the mandamus be not good for all that it commands, it is bad altogether; (a) now it must be bad as to all for which the funds are not adequate.

Cresswell (in the absence of the Attorney General) in reply. That the prosecutor has not traversed any allegation in the return, arises from the return presenting no material fact: no traverse could be taken which would not be objected to for immateriality. It is said that the mandamus is bad, because it demands, at any rate, more than can be performed, for want of funds. But the writ shows, *prima facie*, a power to complete the whole work, by referring to the statute which the defendants have obtained for that purpose. The writ does not become bad in itself by an allegation of inability first introduced by the return.

Then the general question is, not merely whether the statute be permissive as to the whole or imperative as to the whole, but whether, the company having partially availed themselves of the statute, it be not now imperative as to the rest. It is contended that the insufficiency of funds would be ground for an injunction to restrain the company from proceeding, and, therefore, that it would be inconsistent to compel them to proceed in the absence of funds. But, if the argument on the other side were correct, it would be sufficient answer to an application for an injunction, that the company had funds for a part, though not for the whole. Indeed, the prosecutor may urge that an injunction would be granted to restrain the company from proceeding with any part if they were unwilling or unable to execute all: and this agrees with the language of PARKE, B., in *Lee v. Milner*, 2 M. & W. 839. The argument for the defendants, as to this, must go the length of contending that they have no title to the part already completed. In order to make *The Mayor, &c., of King's Lynn v. Pemberton*, 1 Swanst. 244, and *Agar v. The Regent's Canal Company*, (there cited,) applicable, the defendants must contend that the undertakers in these cases might have been restrained from proceeding on account of their failing to provide funds, on a suggestion by themselves, setting up their own default. In *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472, and *Lee v. Milner*, 2 M. & W. 824, no intention to abandon was proved. In *Rex v. The Proprietors of the Birmingham Canal Navigation*, 2 W. Bl. 708, the commissioners were to make the canal "as may be found convenient;" which expressly gave a discretion: the present case more nearly resembles that, put by Lord ELLENBOROUGH,^(b) of trustees appointed by statute with power to provide lamps, who would be liable to

(a) See *Rex v. The Church Trustees of St. Pancras*, 3 A. & E. 535.

(b) Probably referring to *Harris v. Baker*, 4 M. & S. 27, 29.

indictment if they did not provide as many as were necessary. The acceptance of an act of parliament binds as much as the acceptance of a charter: the defendants therefore are here in the same position as the defendants in *Rex v. Mayor of Wells*, 4 Dowl. P. C. 562. It is urged that the mandamus ought to show that there are sufficient funds. Now the mandamus does show that the defendants have executed part of the work; and this they were not authorized to do (stat. 6 & 7 W. 4, c. civi., s. 220) till the sum of 1,600,000*l.*, sufficient to meet "the probable expense of making the said railway and other works," was raised. It is also argued that this application might as well have been made the moment after the act was passed; but the fact insisted upon by the prosecutor is the length of time which has elapsed without completion of the work, the whole time, within which the work can be done, being limited. Then it is contended that there can be no default while any time remains: if that were so, there could be no remedy; for, when the time has elapsed, the works cannot be performed. As to the objection that the mandamus alleges nothing traversable, the refusal to complete the work, which is alleged, is a material traversable fact.

Then, the mandamus having commanded the defendants to do what is necessary, the answer given is, that they have done what they please. It is asked, how it appears that the defendants will not purchase all that is necessary: the answer is, that they have not yet done so, and do not now say that they will. The return of want of funds should at any rate specify how much the company can raise, and how far that will go. All that now appears is that, because the company cannot raise enough for all that remains to be done, they will do nothing more. The allegations in the return as to funds are not traversable; and the defendants have already engaged with parliament that their funds are sufficient. Besides, this part of the return omits the income to be derived from tolls. The company are at least bound to raise what they can, and apply what they raise, including the tolls, to the completion of the work from time to time.

Cur. adv. vult.

LORD DENMAN, C. J., in the same term, (June 16th,) delivered the judgment of the Court.

In this case the Court granted a mandamus to complete the works which the company had undertaken to execute, by virtue of the powers intrusted to them by an act of parliament. A return was made, the sufficiency of which being questioned, it was set down for argument, and has been very fully discussed before us.

The defendants, however, denied that the writ of mandamus itself was legal; and on that preliminary point it is therefore needful that we should first form our opinion.

We were told that our power to issue a writ of mandamus in any such case is at least doubtful; and were properly reminded that the form and method of proceeding may prevent our judgment from being revised by any court of error: a consideration which certainly ought to induce great caution in assuming jurisdiction, but cannot justify us in declining it where the law has lodged it with the Court. We have no more right to refuse to any of the Queen's subjects the redress which we are empowered to administer, than to enforce against them such powers as the constitution has not confided to us. It was urged that, our mandamus to compel obedience to an act of parliament implying a disobedience at present, the prosecutor may indict, and, having that remedy, does not

require the extraordinary process of mandamus. This argument appears to prove too much, as it would prevent the Court from acting in all cases where an act of parliament is contravened. Besides, the indictment does not compel the performance, but only punishes the neglect of duty, though it was thought proper to remind us that mandamus might do no more, for that disobedience would only bring the party into contempt, and expose them to attachment, which would but end in individual suffering, and leave the required act still undone. Yet we are not in the habit of supposing that persons required to obey the Queen's writs issuing from this Court will incur the penalty of contempt for contumacy, or be advised to evade the known and ancient process of the law.

Objections were also raised to a mandamus for insuring the execution of these works. Under this head it was, in effect, insinuated that similar acts of parliament entail no duties whatever on those who may procure them; that they do but offer a boon which the projected company may accept or reject, or partially accept and partially reject, at their sole will and pleasure. The assertion, appearing in them all, that they have provided the means of executing the intended works, was treated as no proof even *prima facie* that they have sufficient funds for that purpose. The provision for disabling the company from taking land after the lapse of a certain term was put forth as a proof that they had full power to proceed with their works or abandon them, without any regard to the interest of others. Some decisions of the Court of Chancery, which have enjoined companies not to take possession of certain lands peculiarly circumstanced, were called inconsistent with any power in this Court to require that possession should be taken of lands under circumstances entirely different. We think it right so far to advert to these remarks, that we may wholly disavow them as having at all conduced to the judgment which we are about to pronounce. When we made the rule absolute, we expressed our conviction that the case was in some respects new, and that its circumstances admitted of some doubt whether our power ought to be applied to them. We shall keep our minds open for the discussion of all such doubts on every proper occasion, but we do not yield to them; nor is it necessary to advert to them in coming to our present decision. We neither hold the Court incompetent to enforce execution of an act under the circumstances disclosed to us in the affidavits, nor think any of the reasons which we have enumerated are conclusive against making our mandamus peremptory.

Those points will be as much open to argument hereafter as they were when the rule was obtained.

But it will be perceived, on adverting to what was said on the former occasion, that we considered the facts then stated to afford strong evidence that the company, having obtained an act for a particular purpose, had stopped short of effecting it, and satisfied themselves with doing less than one-half of what they had undertaken to do, and represented themselves to be capable of doing. It was by that undertaking and representation that they obtained the act, and the great powers of occupying land, and raising money, which it bestowed. We could not recognise their right to say to those who had contracted with them, and to the public, "Our undertaking does not bind us, because our statements were untrue; we have nothing to consider but the pecuniary interests of the company, and claim to exercise an unlimited option over

these works and every part of them." The rule was made absolute, and the writ was directed to go, on the supposition that they had no intention to proceed *bonâ fide* with their works, and had on the contrary abandoned all intention to complete them.

But the prosecutors of the writ have stated no such facts. What they state may raise a suspicion on the subject, but falls far short of proof. The acts are recited in the inducement to the writ, especially the power to vary their line within a given time, or that otherwise they must abide by the line laid down in the plans. The writ proceeds to allege that Charles Symonds is the owner of lands near Yarmouth, enumerated in the schedule, and has required the company to set out and define the line of the railway deviating from that in the plans, and to proceed to make and complete the railway to Norwich and Yarmouth: "yet you, well knowing the premises, but not regarding your duty in that behalf, have absolutely refused and neglected, and still do refuse and neglect, to purchase *the lands* necessary to the making and completing the said railway, and lying between Colchester and Norwich, and between Norwich and Yarmouth aforesaid, or to set out and define the line of the said railway, deviating as aforesaid, or to make and complete the said railway according to the provisions of the said act of parliament:"(a) and, afterwards,(b) it commands the company to complete the whole road, to set out the deviated line especially, and to purchase the lands necessary for that purpose.

Here is no averment that the company have given up their design, or have wilfully exercised any injurious option, or that they are not effecting it with all convenient speed, or that even a reasonable time has elapsed in the opinion of the prosecutors without due preparations being made, or that it would not be more advantageous to all concerned to abide by the original line than set out and define a different one.

The gravamen rests in the simple form of a complaint, that the company has refused to purchase lands at the time when Mr. Symonds required them to do so. There is no inconsistency between this and the possible fact of their having done all that prudence authorized to obtain such lands at equitable prices, and refused to purchase because fair bargains could not be obtained. We can infer no fault; it must be distinctly charged; and the charge, as it stands, is quite insufficient, and falls decidedly below the case which we thought was made reasonably probable by the affidavits on both sides.

Judgment for the defendants.

(a) See pp. 549, 550, ante.

(b) This appears to refer to the mandatory part of the writ.

COLLINS against YEWENS.—p. 570.

When a party is arrested in one action, he is in the custody of the sheriff in all actions in which writs have been delivered to the sheriff.

But, if the first arrest be illegal, the party cannot be *detained* under other writs without a fresh arrest.

But, a sheriff's *arrest* is not prevented by the custody under the former illegal arrest, if there be no collusion.

But, if a sheriff's officer, having arrested without a warrant, procure, for the purpose of making the arrest good, his own name to be inserted in a warrant properly issued in an action to another officer, an arrest or detainer in this action will not warrant a detainer under a *ca. sa.* in another suit, which had been delivered to the sheriff before the first arrest, and no warrant issued on it; nor can the sheriff's officer resort to such last mentioned writ, to support the original arrest; but the Court will discharge the party as to the prior suit. And this, though affidavit be made negating collusion between the plaintiff in the prior suit and the sheriff or his officer.

Quære, whether a defendant, since stat. 3 & 4 W. 4, c. 67, s. 2, can be arrested on a judgment and *ca. sa.*, both more than a year old, and the *ca. sa.* having issued within a year of the judgment, without a *scire facias*.

HUMFREY obtained a rule, in last Easter term, calling upon the plaintiff, the sheriff of Middlesex, and Abraham Slowman, officer to the said sheriff, to show cause why the defendant should not be discharged out of custody in this action, he having been illegally arrested; and why the plaintiff, or the sheriff, or his officer, should not pay the defendant his costs occasioned by the arrest, &c. The facts will sufficiently appear from the judgment. In this term, (a)

Kelly, on behalf of the plaintiff, and *Kennedy*, on behalf of the sheriff, showed cause. They referred to *Howson v. Walker*, 2 W. Bl. 823; *Barratt v. Price*, 9 Bing. 566, (23 E. C. L. R. 384;); *The Case of the Marshalsea*, 10 Rep. 68 b; *Drake v. Sykes*, 7 T. R. 113; and *Goodwin v. Lordon*, 1 A. & E. 378, (28 E. C. L. R. 106.)

Sir *F. Pollock* and *Humfrey*, *contra*, referred to *Spence v. Stuart*, 3 East, 89; *Barclay v. Faber*, 2 B. & Ald. 743; *Rose v. Tomblinson*, 3 Dowl. P. C. 49; (b) *Jacobs v. Jacobs*, 3 Dowl. P. C. 675.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. This was an application to discharge a defendant out of custody, on the ground that he was detained by the sheriff on a writ of *capias ad satisfaciendum* at the suit of the plaintiff, having been illegally arrested in the first instance by one Slowman, who had no warrant; and it does not appear by the affidavits at whose suit Slowman professed to arrest him. Also, on the ground that no *scire facias* had been issued to revive the judgment, which was more than a year old. (c)

(a) May 25th. Before Lord Denman, C. J., Littledale, Patteson, and Williams, Ja.

(b) See p. 55.

(c) Judgment in *Collins v. Yewens* was entered on 25th May, 1837; and a *ca. sa.* issued the same day; the sheriff returned *non est inventus* on 28th September, 1837; and the succeeding sheriff made a similar return on 28th September, 1838. The judgment-roll had been carried into the treasury; and the returns had been entered thereon. No stress was laid on the returns, in the argument. On this point the following authorities were referred to. Stat. 3 & 4 W. 4, c. 67, s. 2; 2 Chitty's Archbold, p. 853, 6th ed.; (but see *ib.* p. 818, 7th ed., and *Simpson v. Heath*, 5 M. & W. 631;) *Scott v. Whalley*, 1 H. Bl. 297; *Ogilvey v. Foley*, 2 W. Bl. 1111; *Taylor v. Hipkins*, 5 B. & Ald. 489, (7 E. C. L. R. 169.)

It is unnecessary to give any opinion as to the second objection, inasmuch as we decide in favour of the defendant on the first.

It appeared that Slowman, who arrested the defendant, was one of the officers usually employed by the sheriff, but who had no warrant in the particular case. The defendant was taken to the lock-up house of Slowman; and, whilst he was there, Slowman obtained a warrant in this action at the suit of the plaintiff, Collins, on a writ which was in the office before the arrest: but, as the warrant was issued subsequently to the arrest, he knew that it could not avail him; therefore he applied to one Nathan, a sheriff's officer who held a warrant against the defendant at the suit of Richardson and another, (the only warrant which appears to have been issued before the arrest,) and persuaded Nathan to give him up that warrant. Nathan endorsed it that it had not been executed by him; but Slowman procured his name to be inserted, and persuaded the sheriff that the defendant had been arrested under that warrant. (a)

The general rule of law undoubtedly is that as soon as a party is arrested in one action, he is considered to be in the custody of the sheriff in all actions in which writs have been issued and delivered to the sheriff; for, as Lord Chief Justice TINDAL says in *Barratt v. Price*, 9 Bing. 570, (23 E. C. L. R. 384,) "it would be only an idle and useless ceremony to arrest the defendant in the rest; it would be 'actum agere.'" But the lord chief justice goes on to add that, "where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ, he is suffering a false imprisonment; and such false imprisonment being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff."

It is obvious that the same observations will apply where the first arrest is by a mere stranger and wrongdoer; for, in such case, the writs in the sheriff's office cannot operate. But if, in such a case, a bailiff having a warrant, arrests the defendant, already illegally in custody, without collusion of those who so have him in custody, such arrest is legal, inasmuch as the defendant is not by such illegal custody privileged from arrest under legal process. And this is the true ground of the decision in *Howson v. Walker*, and *Crowden v. Walker*, 2 W. Bl. 823. Therefore, if Nathan, who had a warrant at the suit of Richardson and another, had arrested the defendant without collusion with Slowman, while he was in Slowman's illegal custody, doubtless the arrest would have been good, and all other writs then in the sheriff's office would have attached upon it. But the case here is widely different. Slowman is the officer in both actions: the present plaintiff, Collins, can have no rights except through the agency of Slowman, to whom a warrant on his writ was directed after the defendant was arrested. Slowman makes no affidavit; we do not know at whose suit he professed to arrest the defendant, whether at the suit of Collins or Richards and another, or Richardson and another. (b) He mentioned no plaintiff's name to the defendant, so far as the affidavits show: and, if we were to hold this arrest or detainer (for it does not appear which it is) good, we should be authorizing any sheriff's officer without a warrant to arrest any person against whom he fancied that writs were

(a) It appeared that, upon this persuasion, the sheriff detained the defendant in *Collins v. Yewens*.

(b) In both these cases, there were writs against Yewens.

lodged in the office, and then to cure the illegality of his original arrest by procuring warrants on the writs so lodged; a speculation which cannot be endured. An affidavit is made by the clerk of the plaintiff's attorney, denying any collusion with the sheriff or Slowman; but this is very vague; and, besides, the warrant in the action is to Slowman himself, the wrong-doer.

In the case of *Richards and another v. Yewens*, (a) the warrant was not directed to Slowman, but to one Willis, a sheriff's officer. There is an affidavit by the clerk of the plaintiff's attorney denying all collusion: and this case depends on the question whether, under the circumstances, the writ, which was in the sheriff's office before the illegal arrest, operated.

We are of opinion that it did not, by reason of the defendant not being at any time legally in custody of the sheriff under any legal arrest. Here, as in the former case, if Willis had arrested the defendant whilst in such illegal custody, he could not have been discharged; but no such arrest was made. We are therefore of opinion that the rules must be made absolute for discharging the defendant in both actions.

Rule absolute, (b) without costs.

(a) It is not thought necessary to report this case more fully.

(b) See *Pearson v. Yewens*, 5 New Ca. 489. 567, (35 E. C. L. R. 192. 232;) *Hall v. Hawkins*, 4 M. & W. 590; *Watson v. Carroll*, 4 M. & W. 592; *Robinson v. Yewens*, 5 M. & W. 149.

END OF TRINITY TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF QUEEN'S BENCH,
AND
UPON WRITS OF ERROR FROM THAT COURT
TO THE
EXCHEQUER CHAMBER,
IN
Trinity Vacation,
IN THE
Second and Third Years of the Reign of Victoria.

The Judges who usually sat in Banc in this Vacation were,
Lord DENMAN, C. J. PATTESON, J.
LITTLEDALE, J. WILLIAMS, J.

The cases, argued and decided in this or former vacations, to which S. is affixed, are reported by Mr. *Smirke*; those argued in Trinity term, 1839, by Mr. *Ellis* and Mr. *Smirke*; the rest by Mr. *Adolphus* and Mr. *Ellis*.

The QUEEN against DAVID JONES.—p. 576.

The surrogate of the bishop's official principal is not the proper party to signify the contumacy of a defendant in a suit before him as Judge of the Consistory Court; and this both before and after stat. 53 G. 3, c. 127: and where defendant is taken under a contumace capiendo issued upon such certificate, this Court will discharge him out of custody.

CHILTON, in Easter term last, obtained a rule to show cause why the writ of contumace capiendo, issued in this case, should not be set aside for irregularity, with costs, and the defendant be discharged out of custody under the writ, and the prosecutor pay the costs of the application. The grounds of the application were, that the excommunication was certified by a surrogate only, and not by the Vicar-General himself, or in the name of the bishop, and that the certificate did not sufficiently set forth the cause of the commitment, or show the jurisdiction of the Ecclesiastical Court.

There were also affidavits on both sides upon the merits; but they were not discussed, the objection turning wholly on the form of the writ. In last Trinity term, (a)

E. V. Williams showed cause. Stat. 58 G. 3, c. 127, s. 1, provides that, in causes cognizable in the Ecclesiastical Court, when any person disobeys a lawful decree, the judge or judges who issued out the citation,

(a) Wednesday, May 22d. Before Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

The following is a copy of the writ de contumace capiendo, reciting the certificate of the ecclesiastical judge.

Victoria, by the grace of God, &c., to the sheriff of Carmarthenshire, greeting. David Archard Williams, clerk, surrogate, and representative of Augustus Pechell, Esquire, Master of Arts, Vicar General and principal official of the Right Reverend Father in God John Banks, by divine permission Lord Bishop of Saint David's, lawfully constituted and appointed the sole judge of the Ecclesiastical and Consistory Court in Carmarthen, in and for the diocese of Saint David's aforesaid, hath signified to us that one David Jones of Placenewydd in the parish of Llannon in the county of Carmarthen and diocese aforesaid, husbandman, is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands of the said D. A. Williams, the judge of the said Court, to pay or cause to be paid to the Reverend Ebenezer Morris, clerk, curate, and incumbent of the parish and parish church of Llannon in the county and diocese aforesaid, or to J. Williams his proctor, the sum of 85*l.* 11*s.* 4*d.*, the amount of costs on his the said E. Morris's behalf, duly taxed in a certain cause of the office of judge, lately depending before the said D. A. Williams, the surrogate and representative of the said A. Pechell as aforesaid, in judgment in the said Court held at Carmarthen, and still remaining, wherein the said E. Morris is the party agent and promvent, of the one part, and the said D. Jones is the party respondent accused and complained of, of the other part, in not obeying the lawful commands of the said D. A. Williams, the judge of the said Court, as herein is described and set forth, to pay or cause to be paid to the said E. Morris, or to his said proctor the said J. Williams, the said sum of 35*l.* 11*s.* 4*d.* the costs aforesaid, and to pay to the said E. Morris, or to his proctor the said J. Williams, the further sum of 3*l.* 2*s.* 8*d.* the taxed costs of a monition and of executing the same monition upon the said D. Jones, and by reason of his manifest contempt and contumacy in not appearing before the said D. A. Williams the judge of the said Court, lawfully authorized and constituted as herein mentioned, and set forth on a certain competent day, hour, and place, now long past, in the cause or matter aforesaid, which is a cause of the office of judge at the promotion of the said E. Morris against the said D. Jones, for divers alleged neglects or omissions of several of the ecclesiastical duties of the said D. Jones in his office of churchwarden of the said parish of Llannon, in the county and diocese aforesaid for the time being, and which said office of churchwarden of the said parish of Llannon, in the county and diocese aforesaid, he the said D. Jones had duly accepted and taken upon himself for the time being; and particularly for his having as such churchwarden [here the writ set forth his wilful absence from, and refusal to attend at, the parish church of the said parish during the performance of divine worship on several Sundays, to see that due order was kept therein, and his refusal, when required, to provide sufficient sacramental bread and wine, having at the time sufficient or ample means in his hands, or in his power, for that purpose; and also his contempt in not attending before the said judge pursuant to a monition duly issued and served on him, and contumaciously refusing to obey the lawful commands of the said judge and to pay the said costs]. Therefore he the said D. A. Williams, lawfully authorized as the judge of the said Court, did in open Court decree and pronounce the said D. Jones, for the causes aforesaid, to be contumacious and in contempt, and the said D. Jones is therefore contumacious and in contempt; and he the said D. A. Williams, the sole judge of the said Court, as herein mentioned and set forth, being within ten days after such his decree being pronounced as aforesaid" [sic]; "nor will he submit to the ecclesiastical jurisdiction; but, forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, we command you, that you attach the said D. Jones by his body until he shall have made satisfaction for the said contempt; and how you shall execute this our precept notify unto us on the 11th January next, where-soever we shall then be in England, and in no wise omit this: and have you there this writ. Witness ourselves at Westminster the 26th November, in the 2d year of our reign.

—BENTALL.

The writ was allowed, enrolled, and delivered of record in this Court in Michaelmas term, 2 Vict.

A return of cepi corpus was endorsed by the sheriff in the same term; but it had not been filed at the time of making the above motion.

or whose lawful decree is not obeyed, may pronounce such person to be contumacious and in contempt, and, within ten days, signify the same in form annexed to the act, to his Majesty in Chancery, as heretofore done in signifying excommunications; and thereupon a writ de contumace capiendo, in the form annexed, shall issue from the Court of Chancery, and all rules and regulations, not altered by that act, applying to the writ of excommunicato capiendo, are made to extend to the writ de contumace capiendo. The blank form in the schedule (A.) may be relied upon as showing that the significavit must be by a higher officer than a surrogate. It uses the plural form, "we hereby notify and signify" &c., and the words "by divine Providence." But the latter words apply only to an archbishop; so that any argument drawn from the use of them would exclude a bishop, or the court of delegates. With respect to the plural form, it appears from *Prankard v. Deacle*, 1 Hagg. Ecc. Rep. 169, 190,^(a) that an archdeacon, and even the surrogate of a vicar-general, are in the practice of assuming it; and that a surrogate is, for some purposes, a judge in criminal suits. The form given is only by way of example, and must be fitted to circumstances. It speaks of the "ecclesiastical judge, or his representative." Here the surrogate is the judge whose decree is contemned, and who is therefore the party to signify. There is an obiter observation of the Court in *Rex v. Ricketts*, 6 A. & E. 537, 541, that the judge is to convey the information only as the instrument of the archbishop; but the practice is contrary to this; and the writ in that case was not objected to though it ran in the name of the official principal. If it be urged that the officer was here the mere deputy of a deputy, the answer is that such deputations are of constant occurrence, and of recognised validity in the spiritual courts. The 128th of the canons of 1603,^(b) regulates the appointment of judicial deputies, and prescribes their qualifications. In *Prankard v. Deacle*, Sir JOHN NICHOLL speaks of the "surrogate or other competent judge." With respect to the statement of the cause in the court below, enough appears to show that it was one within its cognisance.

Chilton, contra. The cause is not sufficiently stated; but at all events the significavit is by the wrong party. The contumacy is to be signified (stat. 53 G. 3, c. 127, s. 1,) "as hath been heretofore done in signifying excommunications;" and all rules, applicable to writs of excommunicato capiendo, are extended to the new writs. Now excommunication was always certified by the bishop. In Co. Lit. 134 a, it is said that none can certify excommungement but the bishop, or one that has ordinary jurisdiction; and a passage from Yearb. Pasch. 11 Hen. 4, 64 A. pl. 16, is referred to, in which it is said that formerly every official or commissary of the bishop might testify excommunication, till it was ordained by parliament that none but the bishop should do so. [PATERSON, J. Can you find any such act of parliament?(c)] None. In

(a) See certificates by a commissary, and by a mayor of London, in the same plural form, in Madox's *Formulare*, pp. 19 and 10.

(b) Gibson's *Codex*, tit. xliii. cap. 3, (vol. 2, p. 991, 2d ed.)

(c) The words of Hankford (then puisne Judge of C. P., afterwards C. J. of K. B.) in the passage in Yearb. H. 4, are as follows; "J'ay trove en mes livres en temps Sir Will' Herle, qu'en ascun temps chescun official et commissary d'evesque purra tesmoigner un excommungement en Court le Roy, et per le mischiefe que ensuit d' icel, il fuit avise en parlement, que nul duist tesmoigner excommungement, mes seulement l'evesque, et cest ley est uncore use," &c. The name of Herle, either as counsel or judge, occurs throughout the reign of Ed. 2, and during a part of that of Ed. 3, until 1336 (9 Ed. 3), when, according to Dugdale, he received his quietus. In all the

Yearb. Tr. 7 Ed. 4, 14 A. pl. 6, it is laid down that the commissary may certify, but it must be in the name of the bishop. The chancellor of Oxford or Cambridge Universities may certify; (a) but the Vice-Chancellor cannot, except in the name of the Chancellor. The rule is, that none can certify but those to whom this Court can write, if necessary; and this Court can only write to the ordinary: *Trollop's Case*, 8 Rep. 68 a. The bishop alone is the judge meant by the statute. But if the Vicar General be, as he is represented in the writ to be, the "sole judge," then the surrogate, who styles himself only the representative of the judge, cannot be a proper person to signify under the act. A surrogate is one "substituted or appointed in the room of another;" Cowell's Law Dictionary, v. *Surrogate*: and the rule "delegatus non potest delegare" applies; for he is only the substitute of a deputy, namely, of a vicar general and official principal. In *Rex v. Ricketts* it was unnecessary to consider whether the writ was objectionable on this ground; but the significavit was there by a judge who united the offices of dean of the arches and official principal, which are always held by the same person. [LITTLEDALE, J. It is said in Com. Dig. *Excommungement*, (B 2), (b) that the certificate of the contempt ought to be by the ordinary by his letters under seal.] If, then, the significavit is irregular, the capias founded on it must be bad, and the party entitled to his discharge. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (June 21st) delivered the judgment of the Court. His Lordship stated that, upon referring to the authorities, it appeared that the writ could not properly be issued upon the certificate of a surrogate in his own name. That such certificate was irregular before the statute 53 G. 3, c. 127, and that there was nothing in that statute showing the intention of the legislature to alter the practice in this respect. The defendant was to have his costs, upon undertaking not to bring any action. (c)

Rule absolute to discharge defendant out of custody as to his commitment by virtue of the writ de contumace capiendo.

cases upon certificates of excommunication during that period, which the reporters have been able to find in the year-books and in Fitzherbert's abridgement, the bishop or archbishop appears to have certified; nor is there any suggestion in them of a change of practice. Fleta, lib. vi. c. 38, s. 2, speaks of the ordinary as the proper person. Bracton, lib. v. cap. 23, s. 3, says that an excommunicate may be taken, "ad mandatum episcopi vel ejus officialis," but not on the mandate of a judge delegate, archdeacon, or other inferior judge, "qui rex in episcopos coercionem habet propter baroniam." But he seems to make a distinction between certificates for the purpose of taking the party, and for the purpose of supporting a plea in abatement. See ib. sect. 1. And see further Regist. Brev. 65; F. N. B. 65; Lyndw. Provin. pp. 127, verb. Brachium seculari; 350, verb. Prælatorum, ed. 1779.

(a) *Trollop's Case*, 8 Rep. 68 b.

(b) Referring to *Rex v. Fowler*, 1 Salk. 293.

(c) The Court made no order to set aside the writ, as in *Rex v. Hewitt* (note (a) to *Rex v. Ricketts*, 6 A. & E. 547, (33 E. C. L. R.)). The defendant elected to take his rule without costs; but no action was ever brought by him. Further proceedings were taken in the Ecclesiastical Court; but they were stopped by the death of the defendant.

CANN against CLIPPERTON.—p. 582.

Where a statutory protection is given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed, *bonâ fide*, that he was so acting. There must be reasonable ground for the belief.

If the party acted under a reasonable, though mistaken, persuasion, from appearances, that the facts were such as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such that the statute clearly affords no justification.

Thus, if by the assumed authority of stat. 7 & 8 G. 4, c. 30, s. 28, which gives power to arrest persons found committing certain offences, a party has arrested another as being so found, under circumstances which afforded reason for thinking that he was, at the time, committing such offence, though in reality he was not, and an action is brought for the arrest, the defendant is entitled to notice of action under sect. 41.

TRESPASS for assaulting plaintiff, forcing him to go to the Justice-room at the Mansion-house, in and of the city of London, and falsely imprisoning him, &c. Plea, Not Guilty. On the trial before Lord DENMAN, C. J., at the sittings in London, after Hilary term, 1838, the following facts appeared.

William Wilman was the landlord of a house in Sun street, Bishops-gate, of which, at the time in question, one Horswell claimed to be tenant, but Wilman disputed the tenancy. In November, 1837, no one being on the premises, Wilman sent in workmen to do repairs. On November 21st, (the day before the alleged trespass,) Horswell's wife, with the plaintiff, who was her brother-in-law, and others, went to the house, and forcibly took possession. Wilman, during the day, endeavoured to repossess himself of the premises, but was driven off. Mrs. Horswell's party remained in the house, and, in the latter part of the day, took out the windows, one of which they shattered. Hall, a policeman, saw the damage going on, and the plaintiff and Mrs. Horswell (as he judged by their gestures) giving directions. Wilman, before he was driven away, desired Hall to take the parties into custody; but he refused. Mrs. Horswell's party remained on the premises during the night. They made a fire on one of the hearths, and suffered the fire to catch the rafters of the house. In the morning, about eight o'clock, Hall, the policeman, went into the house and found it on fire. The plaintiff was not there; but the policeman sent to the plaintiff's house in Holborn for him. He came about half-past ten; and some conversation passed between him and the policeman respecting the fire. The defendant, who was a solicitor, and acted on behalf of Wilman, came to the house between ten and eleven: the policeman was then walking up and down the street; the plaintiff was still on the premises, and other persons going in and out. No mischief was being done at that time. The defendant asked the policeman why he did not take the plaintiff into custody, and directed him to do so. The policeman apprehended the plaintiff, and the parties went to the Mansion-house, where a charge was preferred against the plaintiff under stat. 7 & 8 G. 4, c. 30, "for consolidating and amending the laws in England relative to malicious injuries to property." The charge was dismissed. On proof of these facts, the defendant's counsel urged that the plaintiff must be nonsuited; that the defendant had clearly proceeded on stat. 7 & 8 G. 4, c. 30, s. 28, which enacts, "that any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or

his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law :” and that no notice of action had been given in this case, whereas sect. 41 of the same act provides, “for the protection of persons acting in the execution of this act,” that in “all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act,” “notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action.” The lord chief justice refused to nonsuit, but reserved leave to move that a nonsuit might be entered: and he left it to the jury to say whether the defendant had acted *bonâ fide*, and under a belief that his proceeding was warranted by the statute; whether he, at the time of giving the plaintiff into custody, acted as Wilman’s servant; and whether, at that time, the plaintiff was “found committing” an offence against the statute. The jury found that the defendant acted *bonâ fide*, and as servant to Wilman; but that the plaintiff was not, at the time in question, found committing an offence against the statute. Verdict for the plaintiff with one shilling damages. *Kelly*, in Easter term, 1838, obtained a rule nisi for entering a nonsuit, or verdict for the defendant. He cited *Beechey v. Sides*, 9 B. & C. 806, (17 E. C. L. R. 502,) and *Ballinger v. Ferris*, 1 M. & W. 628; S. C. Tyr. & G. 920.

Platt and *Fish* now showed cause. It was decided by the jury, and is clear from the evidence, that the plaintiff, when taken into custody, was not found committing any offence against the act. The being so found is essential to the right of apprehending summarily under stat. 7 & 8 G. 4, c. 30, s. 28, which differs in this respect from the statute 1 G. 4, c. 56, s. 3, against wilful trespassers, where such right was given in the case of any person who should “have actually committed, or be in the act of committing any offence” there specified. It is said that the defendant is nevertheless protected, because he thought he was acting under the statute in causing the plaintiff to be arrested. But the belief, to furnish such a defence, must be a reasonable belief; here it was quite unfounded. The defendant was an attorney, and might be expected to know the law. In *Beechey v. Sides*, there was a clear case of trespass by the party arrested; the circumstances were such as might lead a man of ordinary discretion to think that he was acting under the statute; *bona fides* was the only question. BAYLEY, J., said, “Where the facts are such that a party may be considered as having any fair colour for supposing that he is warranted by the act of parliament in doing that which is made the subject of an action, he is entitled to notice.” Here no such colour appeared. In *Ballinger v. Ferris*, the defendant’s character of a public officer was taken into consideration; the party apprehended had, in fact, committed a forcible injury just before the arrest; and it was made for that. Lord ABINGER, C. B., there observed that the provisions of stat. 7 & 8 G. 4, c. 30, s. 41, as to notice, would be useless, if they did not extend to cases where the party claiming notice might be unable to justify the conduct complained of; that remark applies where the proceeding has been a mere slip, but not where it is so manifestly without reason, as in this case. BAYLEY, J., in *Cook v. Leonard*, 6 B. & C. 351, (13 E. C. L. R. 195,) (a) states the general rule thus: “Where an act of parliament requires notice before action

(a) See p. 354.

brought in respect of any thing done in pursuance or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the act of parliament, but extend to all acts done *bonâ fide* which may reasonably be supposed to be done in pursuance of the act. But where there is no colour for supposing that the act done is authorized, then notice of action is not necessary." This case falls within the latter part of the rule. It is, indeed, found that the defendant acted *bonâ fide*; but, as was pointed out by PATTESON and COLERIDGE, Js., in *Wedge v. Berkeley*, 6 A. & E. 663, (33 E. C. L. R. 167,) *bona fides* and reasonable cause are two distinct questions in such a case: the finding of *bona fides* negatives any imputation of malice; but the party is not protected if he acted without reasonable cause.

Kelly, *contra*. The defendant's mistake has consisted in overlooking the distinction, noticed on the other side, between stat. 7 & 8 G. 4, c. 30, s. 28, and stat. 1 G. 4, c. 56, s. 3. On the 21st November, it would clearly have been lawful for him, as Wilman's servant, to apprehend the plaintiff while the windows were being pulled out and destroyed under his direction. On the following day, when the defendant arrived, no damage was actually being committed; but there was recent mischief, and the plaintiff was on the premises. Then the defendant, as servant to Wilman, and acting *bonâ fide*, (both which facts are found by the jury,) gave the plaintiff into custody. Such a case is within the protection of stat. 7 & 8 G. 4, c. 30, s. 41. It is laid down as the law, in *Beechey v. Sides*, that, where a defendant has really believed himself justified by statute in doing the act complained of, this section applies. In *Cook v. Leonard*, 6 B. & C. 351, (13 E. C. L. R. 195,) it was evidently the opinion of the Court, and of BAYLEY, J., in particular, that the defendant could not *bonâ fide* have believed himself acting under legal authority. That case was relied upon in *Wright v. Wales*, 5 Bing. 336, (15 E. C. L. R. 462;) and there the question considered by all the judges was, in effect, whether it fairly resulted from the facts that the defendant considered himself justified. In *Cook v. Leonard*, BAYLEY, J., held (p. 355, 356,) that notice is unnecessary only "where there was no colour for supposing the act to be authorized, and that a party is protected if he had reasonable grounds for thinking that a statute gave him the authority which he has used." That the belief was simply erroneous is no ground for denying the protection; if it were, sect. 41 would be useless. It was said by Lord ABINGER, C. B., in *Ballinger v. Ferres*, "We should take away the protection given by the statute, if we were to say that where there is a doubt as to the authority of the party, but none as to his motives, he should not have the opportunity which the legislature designed to give him, of tendering amends. The very purpose for which the act gives him that opportunity supposes him unable to justify the facts; he requires notice that he may tender amends." So PARK, J., said, in *Wright v. Wales*, "If he" (the defendant) "had been acting legally, he would not have wanted the protection afforded by the notice." (*Crowder*, on the same side, was stopped by the Court.)

Lord DENMAN, C. J. The case of justification was a little short on the facts. Wilman had been at the house on the 21st of November and seen the plaintiff there, under circumstances which seemed to show that he was encouraging the mischief then proceeding. A fire takes place during the night: on the following morning the defendant comes

to the premises: he sees the same course of mischief apparently going on, a recent conflagration, and the plaintiff on the premises. Then he says to the police officer, "Why do not you take him into custody?" The defendant seems not merely to have had that impression which was suggested, as to the law, but to have thought that the mischief was actually going on at the time. Else I am unwilling to say that, if a party acts *bonâ fide* as in execution of a statute, he is justified at all events, merely because he thinks he is doing what the statute authorizes, if he has not some ground in reason to connect his own act with the statutory provision. The doctrine attributed to BAYLEY, J., goes too far. But here the defendant might reasonably think that, in point of fact, the circumstances were those to which the protection of stat. 7 & 8 G. 4, c. 30, s. 41, attaches. The rule for a nonsuit must, therefore, be absolute.

LITLEDAL, J. I am of the same opinion. Mere *bona fides* is not sufficient; for a man may be very foolish in believing himself justified. But here the defendant had reason to think that the mischief was going on when he ordered the plaintiff to be apprehended; therefore notice ought to have been given.

PATTESON, J. Perhaps none of the cases differ in principle from the decision we are now coming to: but single expressions are sometimes laid hold of, and too much insisted upon. It is not because a man chooses to think himself acting under a statute, that he can, by such mere fancy of his own, protect himself in an action. But here the defendant had some ground for thinking that he was really in the situation which justified his proceeding.

WILLIAMS, J. I am of the same opinion. It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute; for no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute. Here the defendant might, with some reason, believe that the facts were such as would entitle him to protection.

Rule absolute for entering a nonsuit. (a)

(a) See *Wells v. Ody*, 2 C. M. & R. 128; S. C. 5 Tyr. 725; *Hopkins v. Crowe*, 4 A. & E. 774, (31 E. C. L. R. 177); *Reed v. Cowmeadow*, 6 A. & E. 661, (33 E. C. L. R. 165); *Liddor v. Borrow*, 9 A. & E. 664, (35 E. C. L. R. 233.)

FLIGHT and Another against THOMAS.—p. 590.

CASE for annoying plaintiff in the enjoyment of his house, by causing offensive smells to arise near to, in, and about it. Plea, enjoyment as of right for twenty years of a mixen on defendants' land contiguous and near to plaintiff's house, whereby, during all that time, offensive smells necessarily and unavoidably arose from the said mixen. On a traverse of the right, the defendant had a verdict. Held, that the plea was bad, and plaintiff entitled to judgment non obstante, for that it did not show a right to cause offensive smells in the plaintiff's premises, nor that any smells had, in fact, been used to pass beyond the limits of defendant's own house.

CASE. The declaration stated that plaintiffs, before and at the time, &c., were lawfully possessed, and in the actual occupation of, a certain dwelling-house, &c., and that defendant was possessed and in the occu-

pation of a certain other dwelling-house and premises, and of a piece of ground, with the appurtenances, situated near to, and adjoining, the premises of the plaintiffs, yet defendant, well knowing the premises, but intending to injure plaintiffs, and to incommode and annoy them in the enjoyment of their dwelling-house, on, &c., and on divers days and times, &c., "wrongfully and injuriously caused divers offensive and pestilential stench and smells to arise, come, and be near to, in and about the said messuage or dwelling-house of the plaintiffs, and thereby, during all the time aforesaid, the said premises of the plaintiffs were rendered and became uncomfortable, unhealthy, unwholesome, and unfit for habitation." Pleas. 1. Not guilty. 2. That before and at the time of the committing of the said grievances, defendant was possessed and in the occupation of said dwelling-house and premises and piece of ground with the appurtenances in the declaration mentioned, situate near to and adjoining the said premises of plaintiffs; and that defendant and his predecessors, occupiers for the time being of the said house and premises and piece of ground, for the full period of twenty years next before the commencement of this suit, had enjoyed, as of right and without interruption, the benefit and advantage of having and using a certain mixen in and upon the said premises, contiguous and near to the said premises of plaintiffs, for the more convenient occupation and enjoyment of said premises of defendant; and thereby, during all that time, divers stench and smells necessarily and unavoidably arose from the said mixen; and that defendant, being so possessed, &c., and having occasion to use the said mixen at the said several times when, &c., did use the said mixen for the more convenient occupation and enjoyment of his said premises, as he lawfully might, &c., and by reason of such user the said stench and smells necessarily and unavoidably arose from the said mixen: which are the same grievances, &c. Verification.

Replication, traversing the enjoyment of the mixen as of right for the period in the second plea mentioned, in manner and form, &c.

The cause was tried at the Dorsetshire Spring assizes, 1838, when the jury found that the mixen was a nuisance, but that the plaintiff had come to it: they also found the second plea for the defendant, whereupon a verdict was entered for him on the second issue.

Munning, in the following term, obtained a rule to show cause why judgment should not be entered for the plaintiffs *non obstante veredicto*, on the ground that this was not an easement properly so called, not being a right in alieno solo; and he cited *Hewlins v. Shippam*, 5 B. & C. 221, (11 E. C. L. R. 207,) and *Popham v. Woolcott*, 1 Sid. 291: he also contended that it was, at all events, not an easement within 2 & 3 W. 4, c. 71.

Barstow now showed cause. It is objected, that an easement must be on the land of another. Easements are defined to be "rights of accommodation on another's land, as distinguished from those which are directly profitable;" Burton on Real Property, ch. vi., sect. 3, art. 1165. Here the easement is the right to do that which occasions inconvenience to another. The smell is alieno solo, and the definition of an easement does not require that the right exercised over the neighbour's land should be of a corporeal or substantial nature. The statute of 2 & 3 W. 4, c. 71, applies to those cases in which a grant might have been pleaded

at common law; now there is no reason why the plaintiffs might not have granted to the defendant a right to corrupt the air over their premises, just as they might authorize the establishing of any other nuisance. [COLERIDGE, J. You do not allege a right to make the smell on the plaintiffs' premises, but only to keep a mixen, whereby smells arose.] One right is a necessary consequence of the other, and results from it as of course. Perhaps it might have been stated more distinctly, but the statement is good on general demurrer, and, *à fortiori*, after verdict, when every reasonable intendment will be made in favour of the plea.

LORD DENMAN, C. J. There is no claim of an easement, unless you make it appear that the offensive smells had been used for twenty years to go over to the plaintiffs' land. The plea may be completely proved, without establishing that right. The nuisance may never have passed beyond the limits of the defendant's own land.

LITTTLEDALE, J. The plea only shows that the defendant has enjoyed as of right, and without interruption for twenty years, the benefit of something that occasioned a smell in his own land.

PATTESON, and COLERIDGE, Js., concurred.

S. Rule absolute for judgment non obstante veredicto.

SHEARM against BURNARD.—p. 593.

Assumpsit on a promissory note by endorsee against maker. Plea, that it was delivered by defendant to the endorser, J., to enable him to take up a former note, also made payable by defendant to J., for the accommodation of J., and by him endorsed to plaintiff; and that, after the note declared on became due, the amount was paid to plaintiff by defendant. Replication, *de injuriâ* generally.

Held, that the averment, introductory to the payment of the last mentioned note, might be rejected as surplusage; that the payment only need be proved; and that such payment might be shown without producing the note itself.

Held also, that, in an action by plaintiff on the first note, a verdict and judgment for defendant on the above issue would not be pleadable in bar, nor evidence of any immaterial statements in the plea; for that the replication only put in issue material allegations.

ASSUMPSIT by endorsee against maker of a promissory note for payment of 100*l.*, payable to one Jose, who endorsed to plaintiff.

Plea, that, before the making of the note, defendant, at the request and for the accommodation of Jose, made another promissory note for 100*l.*, payable to the order of Jose, who endorsed it to plaintiff; and that there was no consideration for making the last mentioned note. That the last mentioned note afterwards, and before the making of the note mentioned in the declaration, became due; whereupon defendant made the said second note, and delivered it to Jose, in order to enable him to take up the first note; and that there never was any other consideration for making the second note. That defendant, after the second note (namely, the note mentioned in the declaration) became due, to wit, on, &c., and on divers other days and times, &c., before the commencement of the action, paid to plaintiff divers moneys, to wit, 110*l.*, in satisfaction thereof, and of all damages, &c. Acceptance of such payment by plaintiff in satisfaction. Verification. Replication, *de injuriâ*.

At the trial at the Spring assizes, at Launceston, 1838, the defendant proved payment by Jose of the sum mentioned in the plea in satisfaction of a note, which was stated by the witness to be the note men

ration; but neither that, nor the former note, was
 tant; nor was it proved that the second was
 The note was not given up on payment;
 on by defendant to produce it. It was con-
 e introductory part of the plea ought to
 produced. *Erle*, for the defendant,
 ing out the first part of the plea;
 , by the direction of the judge,
 ad that the plea had not been proved.
 imed a rule nisi for a new trial.

now showed cause. The defendant ought
 e note, which he is alleged to have paid, or
 e plaintiff to produce it. He cannot identify
 out describing its contents; nor be permitted to
 ats without producing it. He proved only payment
 of the note. If it be said that the issue admits the note
 pon, the first note, at all events, is not admitted; for it is
 ed for the first time in the plea, and denied by the replication.
 defendant is bound to prove the whole plea, though the statement,
 ntroductory to the payment of it, might have been omitted. If it is found
 for the defendant, the judgment will be conclusive against the plaintiff
 upon an action on the first note, either as a plea or as evidence, because
 it will establish satisfaction, not only of the second, but also of the first
 note. The defendant ought, therefore, to produce the first note, and
 show the second given in lieu of it. That the plea would have been
 good without some of its averments, is no ground for relieving him
 from proof of them; for there are many cases in which parties are
 bound by needless statements in the pleadings; as where a seisin in fee
 is alleged, when possession alone would have been enough.

Erle, *contra*. The test of the necessity of proof is the materiality
 of the averment. Here all the allegations might be struck out, except
 that of payment of the note declared upon. They are mere surplusage.
 The substance is payment; the rest is a preliminary statement of the
 motive which induced the defendant to give the note. If a verdict and
 judgment for defendant in this action were pleaded in bar to an action
 on the first note, the plea would be demurrable; if given in evidence
 under some other plea, the Court would take notice that the introduc-
 tory matter is not, in effect, traversed by the replication, and therefore,
 need not have been proved.

Lord DENMAN, C. J. If we see enough in the plea to constitute a
 defence independently of superfluous allegations, we may reject them
 and treat them as if they had not been there. Where material facts
 are stated to have happened in a particular way, there the whole must
 be proved as laid, but here the plea professes to state motives by way
 of introduction to the fact of payment. Such statements need not be
 proved. The plea is satisfied by proof of payment and acceptance in
 discharge of the note mentioned in the declaration.

LITTLEDALE, J. As to the effect of a verdict in barring an action on
 the first note, the plea, even if the whole be taken as proved, does not
 distinctly show any satisfaction of it. If it had appeared that Jose had
 paid or discharged it, then such payment, being by one in privity with
 the defendant and not a mere stranger, would have been a bar. But
 here the whole statement with regard to the first note must be rejected
 from the plea.

PATTESON, J. It is clear that the first part of the plea was not proved; for it was necessary to produce the note mentioned in that part, in order to prove its existence. But it is otherwise of the second note, which is admitted on the pleadings, and therefore, need not be produced. I agree with Mr. *Erle*, that, if the judgment for the defendant in this action should be pleaded in bar of an action by the plaintiff on the first note, it would be demurrable; for the replication *de injuriâ* only puts in issue material statements. Needless allegations may be rejected, as in *Tanner v. Bean*, 4 B. & C. 312, (10 E. C. L. R. 340,) where, in an action by endorsee against endorser, it was held that a needless averment of acceptance required no proof.

COLERIDGE, J. The distinction is between an averment, the whole of which can be got rid of without injury to the plea, and an averment of circumstances essential to the defence, which are stated with needless particularity. In the latter case the whole averment must be proved as pleaded. In the former case, in civil or criminal proceedings, the whole may be considered as struck out, and therefore, need not be proved. It is as if the plaintiff, declaring on a warranty, had also alleged a scienter; *Williamson v. Allison*, 2 East, 446. The plea, if found for the defendant, will not, in a future action, be evidence of any thing which it was unnecessary for the defendant to prove in this action. S.

Rule absolute for a new trial. (a)

(a) The following case (see 5 N. & M. 433,) was referred to in the argument.

READ against GAMBLE.—p. 597.

Nov. 3, 1835.

To a declaration in assumpsit on a check, defendant pleaded that it was given for money won at an unlawful game at dice. Issue thereon. The defendant did not give notice to produce the check. Held, that, on this issue, the plaintiff was not bound to produce the check, either as part of his own case, or, when called upon to do so at the trial, as part of the defendant's evidence.

ASSUMPSIT on a check for 21*l.* made by defendant, payable to plaintiff or bearer, on money lent, and on an account stated. Plea, that the check was made and delivered for 21*l.* lost by defendant to plaintiff, and won by plaintiff of defendant by playing with dice at an unlawful game called hazard, at one sitting, contrary to the statute, &c., and not for other consideration. Verification. The same plea as to the account stated; and non assumpsit as to the money lent. The replication joined issue as to the money lent, and took issue as to the check being given, and the account stated, for the money lost, &c. On the trial before WILLIAMS, J., at the sittings at Westminster, after Trinity term, 1835, the plaintiff's counsel did not produce the check. The defendant's counsel contended that the plaintiff was bound to do so as part of his case; but the learned judge was of a contrary opinion. The defendant's counsel then called for the check as part of his own case; but the plaintiff's counsel refused to produce it. No notice to produce had been given. The learned judge ruled that the plaintiff was not bound to produce it. Verdict for plaintiff, with leave to move for a nonsuit.

But now moved for a nonsuit, or for a new trial; and contended, first, that the production of the check was a necessary part of the plaintiff's case; and, secondly, that the defendant was at all events entitled to call for it, though he had given no notice. [Lord DENMAN, C. J. You were not prevented from proving it on your part.] The defendant was entitled to have it produced by the other party. In trover for a written instrument, the plaintiff is not bound to give notice to the defendant to produce the instrument, because the declaration is sufficient notice. So, here, the action being expressly upon the check, the defendant is entitled to consider that the plaintiff undertakes to produce it.

Lord DENMAN, C. J. In trover notice is not necessary to entitle the party to produce secondary evidence. Here the defendant admitted by his plea that he gave the check; and, therefore, the plaintiff was not bound to produce it as part of his own case. Neither was he bound to produce it for the purpose of aiding the case of the defendant.

PATTESON, WILLIAMS, and COLERIDGE, J., concurred.

Rule refused.

STURGE against BUCHANAN.—p. 598.

Plaintiff gave defendant notice to produce certain specified letters written by defendant to his partner, and a letter-book kept by him, containing copies of the above letters; and defendant consented to admit copies of the letters, saving just exceptions, &c., and undertook to produce the letter-book in proof of them.

Held, first, that the book, when produced by defendant, was good secondary evidence against him of the letters specified in the notice; secondly, that, supposing proof of the sending of the letters to be material, the fact of their being transcribed in such a book was evidence of it as against defendant; thirdly, that defendant had no right to read, in his own behalf, other letters upon the same subject, copied in the same book, but not referred to in those read by the plaintiff.

Held also, that, although the above letters were written to a partner resident in New South Wales, yet, as there had been proceedings in Chancery between the same parties on the subject of the action six years before the trial, in the course of which the letters had been referred to, the Court would presume that they had been remitted to England, and that three days' notice to produce them was therefore sufficient.

Held also, that, the object of the evidence being to prove admissions by defendant, the transcripts in the book, made by defendant or by his authority, were alone sufficient for that purpose, without proving, or giving notice to produce, the originals.

ASSUMPSIT for goods sold, and on money counts. Pleas, non assumpsit, and a set-off. Upon the trial of the cause before Lord DENMAN, C. J., at the sittings in London, after Hilary term, 1838, it appeared that the action was brought to recover the value of a cargo of oil belonging to the plaintiff, and sold by the defendant to satisfy certain advances made by defendant's partner, Lamb, residing in New South Wales, to the captain of the vessel, for the alleged purpose of repairing and refitting it on its homeward voyage. Some of the disbursements, which the advances were intended to meet, did not come within the description of necessary repairs or expenses; but it was contended by the defendant that the plaintiff had ratified and adopted them by his subsequent conduct and dealings with the defendant. For the purpose of showing that defendant's partner had made the advances improperly, and that his acts had not, in fact, been recognised by the plaintiff, the plaintiff offered evidence of admissions contained in certain letters written by defendant to his partner in New South Wales, in 1831, of which plaintiff had obtained a knowledge by means of a bill in equity filed by him against defendant and his partner, in December, 1831, on the subject of this suit. The present action was commenced in 1832. Before the trial, defendant was required, in the usual form, to admit, among other documents, certain "duplicates, copies, and extracts" described in the schedule of the notice as an "Extract from a letter-book kept by the defendant, No. 304, date 25th July, 1831; Ditto, No. 313, date 1st September, 1831; Ditto, No. 374, date 10th December, 1831," &c.; and that such duplicates, copies, or extracts, were true duplicates, copies, or extracts, and that the originals were respectively written, signed, dated, sent, delivered, and received as stated in the schedule, saving all just exceptions to the admissibility of the several documents as evidence, &c.

An order to admit was thereupon made by consent on 14th February, 1838; and the documents referred to were signed by the judge and attorneys for the purpose of identifying them. The defendant's attorney also undertook to produce at the trial the "Letter-book" referred to in the notice.

On the 16th February, four days before the trial, defendant was duly
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served with notice to produce certain specified letters written by him to his said partner, numbered and dated as in the above notice to admit; and also "the letter-book kept by the said defendant, containing the drafts, duplicates, or copies of the several letters above specified," &c., "and which letter-book you, the said" (defendant's attorney,) "have given an undertaking in this cause to produce on the trial hereof."

At the trial, the notice to produce the letters was objected to as too short, inasmuch as they must be presumed to be in New South Wales. The lord chief justice overruled the objection, and admitted the letter-book, (from which the extracts, referred to in the notice to admit, had been copied,) as secondary evidence of the letters themselves. The book, which was endorsed "Lamb, Buchanan, and Co." purported to be copies of, or extracts from the correspondence between the defendant and his partner Lamb. Three of these letters, purporting to be copies of letters written by the defendant, Lamb, were read on the part of the plaintiff. The defendant then claimed a right to read to the jury several others contained in the same book; but his lordship refused to permit any to be read on behalf of the defendant, except two which were expressly referred to in the letters read by the plaintiff. The jury found a verdict for the plaintiff.

In the following Easter term, Sir *W. W. Follett* obtained a rule nisi for a new trial, on the points taken at Nisi Prius, and also for misdirection. The latter ground of motion is here omitted.

Sir *J. Campbell*, Attorney General, Sir *F. Pollock*, *R. V. Richards*, and *Swann*, now showed cause. (a) The notice to produce was sufficient under the circumstances. But, at all events, the entries made by the defendant's direction in a book kept by him are evidence as against him. The original letters might have been produced by the defendant; and, in their absence, the copies and extracts in the book are admitted to be true copies and extracts. The defendant objected to the admissibility of the copies signed by the judge, because he was willing to produce the book itself from which they were extracted; and, when produced, he insisted on reading the copies of all other letters transcribed in it. But the reading of one letter in it does not make another unconnected one, evidence. It makes no difference that the letters happen to be bound together in a book. If they had happened to be upon the same file, it could not have been contended that all were made evidence; yet the case is not, in principle, different. Similar attempts have been made to put in evidence bundles of proceedings in bankruptcy, or all the entries in corporation books, merely because one paper or entry has been read by the opposite party; but they have always been rejected by the Court. *Call v. Howard*, 3 Star. N. P. C. 5, is exactly in point. There the defendant was not allowed to read distinct entries in his own day-book, though the plaintiff had read one of them against him. The same point has been ruled in the case of parol evidence of assertions made in the course of the same conversation; *Prince v. Samo*, 7 A. & E. 627, (34 E. C. L. R. 183.)

Kelly and *Wightman*, contra. The plaintiff unfairly seeks to avail himself of his knowledge of letters, obtained from the defendant's answer in Chancery, without reading the answer itself, the originals being in New South Wales in the possession of the party to whom they were addressed. There was nothing from which the defendant could infer

(a) Before Lord Denman, C. J., Littleale, Paterson, and Williams, Js.

that the production would be required at the trial; and the notice itself allowed no time to procure them. Secondary evidence was therefore inadmissible. But, supposing the notice to be sufficient, neither the admissions, nor the book, were evidence that any such letters had been sent. The defendant is only ordered to admit that certain extracts are true extracts from a certain book called a "letter-book," kept by the defendant. He does not admit that the letter-book contains true copies of the original letters, nor that such letters were ever sent, or even written. All just exceptions to the admissibility of the book itself, or the extracts from it, are saved. If, therefore, the letters were relied upon as such, then the book was not evidence of them. But, if the book was put in evidence, not as containing copies of letters, but as a document containing a statement of the transactions made by the defendant himself, or his clerks with his privity, then every part of it relating to that transaction ought to have been read, if required. If the book had been headed, "Detail of circumstances relating to transactions between Sturge and Buchanan and Co.," no doubt the whole would have been made evidence, if the plaintiff chose to read a part. Yet the book was, in fact, only a narrative made up of a series of extracts and copies of letters. If the plaintiff had read a partial extract from one letter, the whole might have been read by the defendant. So where he reads one of a series of extracts from correspondence, the whole series ought to be laid before the jury, if it tends to explain, qualify, or illustrate the parts selected by the plaintiff. The fallacy lies in treating the document as separate letters, and not as one entire book. *Cutt v. Howard*, 3 Stark. N. P. C. 5, was a *Nisi Prius* decision against the party who ultimately succeeded, and, of course, was very little discussed. It is not clear, too, what was the subject of the entries there referred to, or the degree of connexion between them. The term "unconnected" used in the report, is very general. As to *Prince v. Samo*, 7 A. & E. 627, (34 E. C. L. R. 183,) there is a distinction between evidence of a conversation, which is a term of vague import and undefined extent, and proof of a single document. Where a book is produced, the evidence is confined within the compass of it, and no question can arise as to what is, or is not, a part of the same document.

Cur. adv. vult.

LORD DENMAN, C. J., on a subsequent day in this vacation (22d June,) delivered the judgment of the Court.

As to the evidence, the plaintiff had had the advantage of seeing some letters written and sent by the defendant to his partner, exclusively, I presume, by means of a suit in chancery. He gives him notice to produce three of them, which he particularly describes. He then summons him before a judge to admit copies of those three letters: the judge orders accordingly, by consent, and subject to all just exceptions; and the copies are signed by the judge and the attorneys; the defendant at the same time agrees to produce his letter-book at the trial. The notice is proved; the signed copies produced; which are objected to, because the defendant had agreed to produce the book; the book is then called for and produced: plaintiff proposes to read the three letters.

This proceeding gives rise to several objections.

First, that the notice is insufficient, the letters having been sent to the partner in New South Wales; and therefore no secondary evidence receivable.

The sufficiency of the notice in all cases depends on circumstances. If the letters are in New South Wales, this notice is nothing. But there is no proof of this, nor any presumption. This action was brought in 1832; proceedings had since been commenced in chancery, (a) and were greatly prolonged: all documents were probably sent over and produced, and would remain in England, where they were likely to be wanted. The notice then was good; secondary evidence was admissible; and the plaintiff was free to call for the letter-book as a means of proving the contents of those particular letters.

Secondly, even if he was not, defendant had expressly undertaken to produce that letter-book for proof of those letters. He does so; but contends that they are not to be read without proof that they actually were sent.

The answer is, first, that the description of them as *sent* is perfectly immaterial, the writing of them by defendant being the only fact required to make them evidence. Secondly, the letter-book, when produced in pursuance of the undertaking, clearly shows that they were sent. The very fact of their being transcribed into such a book proves this as against the party keeping it. Defendant now says, "as you prove the letters by my book, I have a right to read in evidence the whole of that book; or at least the whole correspondence on the subject, as it is found in the same book. You produce a document of my writing, and *must* read the whole." But how can this be called a document? It is a series of copies of letters written from time to time, on principle exactly the same thing as if they had been kept in his counting-house on a file. It is like proving what a party said in one conversation: one of these letters, or one of these conversations, may be proved without authorizing the opposite party to bring forward, for his own benefit, what he himself said or wrote in another conversation, or a different letter. The late decision in *Prince v. Samo*, carries this principle much further. That the rest of the correspondence may throw light upon these parts of it, is true; but the light may be a false one. Plaintiff is not bound to know whether it would or not; nor whether any other statements were made as they appear in the book, or, if made, were true.

It was surmised that an unfair advantage had been taken of the defendant in obtaining a knowledge of these letters through a suit in chancery, and then producing them without the answer, which may have greatly qualified and altered their effect. But I cannot think that a judge at nisi prius has any thing to do with these considerations: he is to inquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved. Or (taking this to be a piece of original evidence, as written by defendant or by his authority) he is to prove the handwriting, or the authorization. He does this by the undertaking to produce the book in proof of the three letters described, and of the three letters only; the mode of proving them can give the other side no new rights. [His lordship then proceeded to give judgment on the merits of the case, and on the alleged misdirection.]

Rule discharged.

(a) The bill in chancery was filed in 1831, before the commencement of the action. The marginal abstract pursues the statement of facts as recited in the judgment.

LUNNISS against ROW.—p. 606.

The objection of incompetency on the ground of interest, arising on the examination of a witness, may be removed by the parol evidence of the same witness that he has been released; though his interest appears on the face of the plea which he is called to prove.

Therefore, where, in an action against the acceptor of a bill, defendant pleaded that it was accepted for the accommodation of the drawer, who endorsed it to plaintiff without consideration: Held, that the drawer, who was called by defendant to prove the plea, and who gave parol evidence of a release by defendant, was competent, without producing or formally proving the release.

Quære, whether, in such case, a release be necessary since 3 & 4 W. 4, c. 42, s. 26!

ASSUMPSIT by endorsee of a bill of exchange drawn by J. Smith on, and accepted by, defendant.

Plea: That defendant accepted the bill for the accommodation and use of the said J. Smith, and solely for the purpose and in order that he might raise money thereon by getting the same discounted, and that there was not, at any time, any consideration or value for defendant's acceptance thereof. That J. Smith endorsed and delivered the bill to plaintiff before it became due, and plaintiff then received and held the same for a special purpose, to wit, for the purpose and in order that the plaintiff might get it discounted for J. Smith, and pay the proceeds thereof to him for his use and benefit. That plaintiff, in violation of good faith, and without the consent of J. Smith, held and detained the same under pretence that he would destroy it, and had fraudulently put it in suit without having given any value for it. Verification. Replication, *de injuriâ*.

At the trial before Lord DENMAN, C. J., at the London sittings after Hilary term, 1838, Smith, the drawer, being called as a witness for the defendant to prove the matters alleged in the plea, was objected to as incompetent. On examination, he stated that he had been released by the defendant, and gave parol evidence of the contents of the release; but the release itself was not produced. It was contended, for the defendant, that no release was necessary since stat. 3 & 4 W. 4, c. 42, s. 26; and that, if it was, sufficient proof of it had been given. His lordship directed the witness's name to be endorsed on the record, and received the evidence, reserving leave to move to enter a verdict for the plaintiff. The jury found for the defendant. In Easter term, *R. V. Richards* obtained a rule nisi accordingly.

Butt now showed cause. The incompetency of the witness only arises from the fact of his being an accommodation drawer. This is admitted by him; but he also states that he has been released. [Lord DENMAN, C. J. The objection is, that the proof of his incompetency was not obtained from himself on the *voir dire*, but from your own admission. At the trial he was produced on your part as the person mentioned as drawer in the declaration, and alleged in your plea to be an accommodation drawer.] In effect it is the same as if he had stated his interest on the *voir dire*. He was called to prove that he was the person named in the plea, and was an accommodation acceptor: this would have disqualified him, but for the release. The general rule applies, that where his own admission disqualifies him, the same testimony will be sufficient to prove the removal of the disqualifying interest. *Goodhay v. Hendry*, M. & M. 319, (22 E. C. L. R. 301,) is the only case

that appears to contradict the rule. There the bankrupt was held incompetent for his assignees, in an action to recover a debt due to the estate, without regular proof of the certificate. That case, however, whether distinguishable or not from the present, has not been followed, as appears in the note of the reporter, and in *Carlisle v. Eady*, 1 C. & P. 234, (11 E. C. L. R. 378.) *Quarterman v. Cox*, 8 C. & P. 97, (34 E. C. L. R. 109,) only shows that, if the release is actually produced, the opposite party has a right to inspect and read it [On the point, as to the effect of the statute in making the witness competent without a release, the argument is omitted.]

R. V. Richards and *Whitehurst*, *contra*. The rule is, that where the objection is elicited from the witness alone, it may be repelled by the same species of evidence, namely, by parol evidence. But here, as soon as the identity of the witness with the party named in the plea appears, his incompetency stands confessed by the defendant, and must be repelled by legitimate evidence. Nor is there any hardship in this; for the defendant is necessarily apprized of the objection, and might have provided himself with proof of the release. [PATTESON, J. Would you require proof by attesting witnesses?] An attesting witness is needless to a release; but if there be one, he must be called. *Goodhay v. Hendry*, M. & M. 319, (22 E. C. L. R. 301,) is in point, and is confirmed by the opinion of TINDAL, C. J. in the case there cited in the note to p. 320. The point must have occurred more rarely before the new rules of pleading, because special pleas, disclosing the interest of parties on the face of the record, were not then usual.

LORD DENMAN, C. J. This is a question of practice, and I never, in my experience, knew any practice prevail different from that which was adopted in this case.

LITLEDALE, J. The fact, that the witness's name is on the record, and that his interest is alleged in it, makes no difference in principle. He knows nothing about the record, and cannot, therefore, on that account, be presumed to have had notice of the objection that would be made to his testimony.

PATTESON, J., (*a*) concurred.

S.

Rule discharged.

(*a*) Williams, J., was absent.

EVANS against FRYER.—p. 609.

Assumpsit on a wager that a railroad would be completed for the general conveyance of passengers to A. and B. within six years. Averment, that it was completed for the general conveyance of passengers to A. and B. within six years. Plea, traversing the averment. Held that, under stat. 3 & 4 W. 4, c. 42, s. 23, the judge at Nisi Prius might amend the record, agreeably to the evidence, by striking out the words "for a general conveyance of passengers" in the declaration and plea.

ASSUMPSIT. The first count of the declaration stated that, at the time of the making of the promise, &c., a certain railroad was intended to be made from Birmingham in the county of Warwick, to join a certain

other railroad theretofore made from Manchester to Liverpool respectively in the county of Lancaster, and so to form a railroad *for the conveyance of passengers and goods* to and from Birmingham aforesaid and Liverpool aforesaid. And thereupon, heretofore, viz. 14th July, 1831, a discourse was had between plaintiff and defendant of and concerning the said intended railroad, and the probable length of time which would elapse before it was completed *for the general conveyance of passengers* to and from Liverpool aforesaid and Birmingham aforesaid; and, upon that discourse, plaintiff then affirmed that a railroad would be completed *for the general conveyance of passengers* to and from Liverpool aforesaid and Birmingham aforesaid, in six years from the said 14th day of July, 1831, which defendant then denied, and affirmed that no railroad would be completed *for the general conveyance of passengers* to and from Liverpool and Birmingham aforesaid in six years from the said 14th day, &c., and thereupon afterwards, viz. on, &c., in consideration that plaintiff, at the request of defendant, had then promised defendant to pay him 50*l.* if a railroad was not completed *for the general conveyance of passengers* to and from Liverpool aforesaid and Birmingham aforesaid in six years from the said 14th day, &c., defendant then promised plaintiff to pay him 150*l.* if a railroad was completed *for the general conveyance of passengers* to and from Liverpool aforesaid and Birmingham aforesaid in six years from the said 14th day, &c. Averment, that a railroad was completed *for the general conveyance of passengers* to and from Liverpool aforesaid and Birmingham aforesaid in six years from the said 14th day, &c., that is to say, on 4th July, 1837, whereof defendant on, &c., had notice, whereby he became liable to pay, &c. Second count on an account stated.

Pleas. 1. Non assumpsit. 2. As to the first count, that the said railroad was not completed *for the general conveyance of passengers* to and from Liverpool aforesaid and Birmingham aforesaid in six years from the said 14th July, 1831, in manner and form, &c. Conclusion to the country. Issues on the two pleas.

On the trial before PARK, J., at the Warwickshire Spring assizes, 1838, the evidence as to the terms of the wager was given by the plaintiff's attorney, who stated that, at the expiration of the six years, a dispute having arisen on the wager, he, as attorney for the plaintiff, called on defendant, who admitted the bet but said that he had won. The witness then said, "I believe your bet was 150*l.* to 50*l.* that a railroad would not be completed for the general conveyance of passengers to and from Liverpool to Birmingham in six years from the 14th July, 1831." Defendant answered, "My bet was, a railroad would not be completed from Liverpool to Birmingham in six years." It appeared that, within the six years, the railway was completed from Liverpool to a terminus, at the Birmingham end, called Vauxhall; and the contest between the parties had been before the bringing of the action, and was at the trial until the close of the plaintiff's case, whether the railway to Birmingham could be deemed complete when carried only to Vauxhall. It appeared, also, that the railway was opened within the six years for conveying passengers, and goods of some descriptions, but not heavy goods, which, at the time of such opening, the railway company did not intend to convey. When the plaintiff's case was concluded, the defendant's counsel contended that there must be a nonsuit on the ground of

variance between the wager proved and that stated in the declaration. The plaintiff's counsel then prayed that the record might be amended, under stat. 3 & 4 W. 4, c. 42, s. 23; and PARK, J., permitted the declaration and plea to be amended by striking out the words "for the conveyance of passengers and goods" in the declaration, and the words "for the general conveyance of passengers," wherever they occurred. The defendant's counsel objected altogether to the amendment, and did not pray to be admitted to any terms, in consequence of it, under sect. 23. He addressed the jury on the question, whether or not the railway had been *completed* within the six years; and the jury, without hearing the case summed up, found a verdict for the plaintiff. *Humfrey*, in Easter term, 1838, obtained a rule nisi for a new trial, on the ground that the amendment put a new and unexpected issue on the plaintiff, and was unwarranted by the statute.

Goulburn, Serjt., and *Hildyard* now showed cause. The variance was (according to the language of stat. 3 & 4 W. 4, c. 42, s. 23) in a particular "not material to the merits of the case, and by which the "defendant cannot have been prejudiced in the conduct of his defence." Not only was the defendant not prejudiced, but his situation was bettered, for the amendment removed a qualification which was in the plaintiff's favour. and obliged him to prove that the road was "completed," in the full sense, and not merely "for the general conveyance of passengers." And he did in fact prove that the railway had been completed for that and every purpose originally contemplated. *Whitwell v. Scheer*, 8 A. & E. 301, and *Sainsbury v. Matthews*, 4 M. & W. 343, afford precedents fully justifying the course here taken.

Humfrey and *Waddington*, contra. The real question is, whether the amendment introduced an issue differing, on the merits, from the original one. The judge has no power to make an amendment altering the state of the case on the merits. Here the defendant had pleaded that he did not make a certain bet: issue was joined on the plea; and it had appeared, by the evidence given, that the defendant was entitled to succeed, and recover costs, on that issue. He ought not, then, to have been compelled to take a different one. [PATTERSON, J. That argument would apply to every case where a contract has been declared upon and denied. It would defeat the statutory provision.] There is no instance of an amendment under the act which has so completely brought a new state of facts into dispute. The amendment in *Sainsbury v. Matthews*, 4 M. & W. 343, did not go so far; nor did that in *Hanbury v. Ella*, 1 A. & E. 61, where "guarantee" was substituted for "pay," it being clear from the record itself that a guarantee was contemplated. Here the statement of the bet, as amended, introduced an entirely new proposition, and required a different line of proof. The wager, as declared upon, was, that the railroad would be completed for the general conveyance of passengers; as amended, it was, that the railroad would be completed, which might mean completed for all purposes of carriage, or completed merely by the machinery being all laid down. Whatever may be the effect of such an alteration, the judge has no right, by making it, to compel a party to plead that which he does not wish to plead, and which perhaps is not true. [WILLIAMS, J. You might have said, when the amendment was proposed, that you could not deny the fact as then stated. LITLEDAL, J. The judge might

then, under the act, have compelled the plaintiff to pay all the costs of your original plea. PATTESON, J. The judge cannot amend where the alteration is material to the merits. You show, here, that it was not so, and that you came into Court merely to nonsuit the plaintiff. The clause was introduced to avoid that.] The learned judge should have had the facts found specially and the finding entered on the record, under sect. 24.

LITTLEDALE, J.(a) I think there is no ground for a new trial. It is true, as the plaintiff's counsel say, that the amendment imposed an additional burden of proof; but on whom? On the plaintiff. He, and not the defendant, was prejudiced. The defendant has nothing to allege but that the declaration, as it originally stood, was not, in form and in point of law, maintainable under the circumstances. The alteration did not affect the merits.

PATTESON, J. If the amendment had taken off any burden of proof from the plaintiff, there would have been truth in the argument for this rule. But it could not do so, unless we are to suppose that the wager, as it ultimately stood, that a railway would be *completed*, meant merely that the rails would be laid down and fit to be used. I think it would be trifling to say this. The words must be taken to mean that the railway should be complete so as to be in public use. And, if so, the amendment threw a rather larger onus of proof upon the plaintiff than he took upon himself at first. The defendant cannot complain that the merits are altered because this additional burden is laid upon his adversary. If he really went to trial relying upon the variance, his counsel, when the mistake was corrected, should have demanded such terms as would have enabled him then to give the real answer, if he had one, on the merits. But I do not believe that he went to trial in any such reliance.

WILLIAMS, J. This amendment was properly made; because, if the power of amending were not liberally exercised, it would be a grievous hardship that only one count is permitted on one subject of complaint. And the amendment could not be disadvantageous on the merits, as far as the defendant was concerned. It would be trifling to say that a railway being completed meant only the laying down of the tram-road. The meaning clearly was, that it should be complete for all the purposes of a railroad; for the carriage of goods as well as men. And, if so, the plaintiff had more to prove on the amended than on the original issue.

Rule discharged.

(a) Lord Denman, C. J., had left the Court.

WAIN against BAILEY.—p. 616.

The maker of a note, not negotiable, cannot refuse to pay the amount when due, on the ground that the payee has not got it in his possession or power, and cannot produce it for the purpose of delivering it up to the maker on payment.

ASSUMPSIT on a promissory note made by defendant, payable to plaintiff [not to order, or bearer] on the 25th March. Plea, that when the note became due, to wit, on, &c., defendant was ready and willing to have paid plaintiff the amount of the said note, whereof plaintiff then had notice, and defendant then requested plaintiff to produce the said note, for the purpose of the same being delivered up to him, the defendant, on payment of the amount thereof; but that plaintiff, when so requested to produce the same for the purpose aforesaid, had *not* the said note in his power, custody, or possession, nor could then deliver or have delivered it up to defendant, and confessed and admitted that he could not then deliver up the same to defendant, if defendant should then pay the amount thereof. Whereupon defendant did then refuse to plaintiff the amount of the said note, as he lawfully might, &c.; and defendant says that he has always, since the said note became due, and since the said admission and confession of the plaintiff, been, and still is, ready and willing to pay plaintiff the amount of the note on the same being produced and delivered up to him on payment thereof; but plaintiff has never since produced or offered to deliver it up to defendant on payment thereof, &c. Verification. Replication, *de injuria absque tali*, &c.

The action was tried at the Derbyshire Spring assizes, 1838, when a verdict was found for the defendant.

In Easter term following, *Clarke* obtained a rule to show cause why judgment should not be entered for the plaintiff *non obstante veredicto*.

Whitehurst now showed cause. The question on this record is, whether the maker of a note, who is ready, and offers, to pay it when due, is bound to do so except upon redelivery? *Hansard v. Robinson*, 7 B. & C. 90, (14 E. C. L. R. 20,) is in point. It was there decided that the holder of such a security cannot sue upon it without producing and offering to deliver it up. Lord TENTERDEN there says, "What is the custom in this respect? It is that the holder of the bill shall present the instrument at its maturity to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill, has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money? Supposing the note to have been negotiable, this would be a direct authority. [PATTERSON, J. It shows only that the holder cannot recover on a lost note; it was not decided that he could not have recovered if he had found it.] The reason assigned, namely, the want of a voucher and security against a second demand, applies equally whether the note be lost or not. The only distinction is the non-negotiability of the bill in this case. But that is not a sufficient protection, for the plaintiff may have pledged or equitably assigned it. Even if he has not parted with it, the defendant ought not to be exposed to the difficulty of proving payment, in case he

should be again sued on it. He cannot, at common law, compel the plaintiff to give a receipt, and is not obliged to take a witness with him. [PATTERSON, J. In *Rolt v. Watson*, 4 Bing. 273, (13 E. C. L. R. 430,) the plaintiff was allowed to recover for goods sold, though defendant had accepted a bill for the amount, which had been lost before it had been endorsed by the drawer: your argument would equally apply to such a case. LITLEDAL, J. The defendant would be exposed to the same risk, if he were sued on a bond, which the obligee is not bound to redeliver.] The action is founded on the custom of merchants, for this is a note within the custom, though not negotiable; *Smith v. Kendall*, 6 T. R. 123; *Rex v. Box*, 6 Taunt. 325, (1 E. C. L. R. 401 :) if so, the custom to redeliver on payment must be observed. The promise is only to pay agreeably to the custom.

Clarke, contrà, was stopped by the Court.

Per Curiam. (a) The plea is bad.

S. Rule absolute for judgment non obstante veredicto.

(a) Lord Denman, C. J., Littledale, Patterson, and Williams, Js.

WEDGEWOOD against HARTLEY and Others.—p. 619.

TRESPASS for distraining on plaintiff. Plea, that W. held the premises as tenant to defendants, at a rent of 10*l.*; and distress for such rent. Replication, non tenuit.

The case opened for plaintiff at the trial was, that W. was seised in fee, and that plaintiff held the premises of him at a rent of 3*l.*

Held, that W.'s wife was not a competent witness for plaintiff to prove those facts, because, in the event of a verdict for defendants, W. would be liable over to plaintiff; and that the incompetency, being independent of any use that might be made of the verdict, was not removed by 3 and 4 W. 4, c. 42, s. 26.

TRESPASS for breaking and entering the plaintiff's house and taking his goods.

Pleas. 1. That plaintiff held the house as tenant to the overseers and guardians of U. under a demise at a yearly rent of 10*l.*: justification of entry and seizure under a distress for rent in arrear. 2. A similar plea stating a tenancy to the same persons on the same terms, by one W. Wedgewood, the elder. Replication to each plea, denying the tenancy, and issues thereon.

At the trial before PATTERSON, J., at the York Spring assizes, 1838, the plaintiff's counsel stated, in opening the case, that the house belonged to W. Wedgewood, the elder, the plaintiff's father, who had built it himself on a piece of waste, and occupied it without acknowledgment or rent for twenty years and upwards; and that the plaintiff had been let into possession, in 1832, as tenant to him, at the annual rent of 3*l.* To prove this, he called the wife of Wedgewood the elder, who stated, on cross-examination, that she had received rent from the plaintiff as tenant to her husband. She was objected to as incompetent, because her husband would be liable over to the plaintiff, in case a verdict should be found for the defendants. The learned judge, with some doubt, admitted the evidence, and the jury negatived both the pleas. In the following term, *S. Temple* obtained a rule nisi for a new trial on the above point.

Alexander and *W. H. Watson* now showed cause. Wedgewood, the elder, was not interested in disproving his own tenancy under the

defendants; he was rather interested in proving it. If he had a title paramount to that of the defendants, it would not be affected by the verdict in this action. A verdict for the plaintiff will not be of any use to him, nor would a verdict for the defendants be in any way available against him. It would not alter the possession, or displace or prejudice his title: *Doe dem. Nightingale v. Maisey*, 1 B. & Ad. 439, (20 E. C. L. R. 420.) (a) The rule, as laid down in *Doe dem. Teynham v. Tyler*, 6 Bing. 390, (19 E. C. L. R. 111,) (b) is, that a witness is interested "first, where he has a direct and immediate benefit from the event of the suit itself; and, secondly, where he may avail himself of the benefit of the verdict in support of his claim in a future action." Here the event cannot affect the witness's husband: *Simpson v. Pickering*, 1 C. M. & R. 527. [PATTESON, J. The objection was, that if the defendants established a right to distrain on the plaintiff, he would have a right of action over against his father.] It does not appear upon what terms the plaintiff held of his father, or that the latter was in any way bound to indemnify his son. A distress is not an eviction. The defendants are bound to show every thing that is necessary to disqualify the witness, and cannot call upon the Court to presume liabilities which do not appear.

S. Temple, contra. This is a case of incompetency arising from an interest in the result of the cause, independently of any use that may be made of the verdict. In an action by the plaintiff against his father to indemnify him for the rent recovered by the distress, he would be able to show the title of the overseers, and the distress by, and payment to, them, by their evidence, without producing the record of this action. The objection is therefore not removed by 3 & 4 W. 4, c. 42, s. 26; *Harding v. Cogley*, 6 C. & P. 664, (25 E. C. L. R. 586.) (c) It is unnecessary to show any express covenant or contract to indemnify the plaintiff, for there will be an implied legal liability to do so. If, indeed, the witness had admitted a tenancy by her husband under the defendants, and the plaintiff had been a sub-tenant at the same, or a greater rent, which rent was in arrear at the time of the distress, there would then have been no liability over; but here the facts, to be proved by the witness, are repugnant to the defendant's title. If the plaintiff's case is a true one, Wedgewood, the elder, will not lose his rent; if the defendants succeed, then the plaintiff has been subjected by his landlord to liabilities to a larger amount than his own rent, and will be entitled to be reimbursed.

LORD DENMAN, C. J. There are two pleas; one asserting a tenancy under the overseers by the son; the other by the father. The wife of the father is called as a witness to negative the latter plea. There is a direct interest in disproving it; for if such a tenancy exists, Wedgewood, the elder, will be liable over to the plaintiff to indemnify him for a payment which he is obliged to make through his father's default.

PATTESON, J. The incompetency here is not by reason of the admissibility of the verdict or judgment as evidence for or against the witness, but is independent of that reason. The fact of the father's tenancy is in issue. If it be established, he is liable to an annual rent of 10*l.*, which the plaintiff will be obliged to pay. The plaintiff's own rent is only 3*l.*;

(a) See also *Rees v. Walters*, 3 M. & W. 527.

(b) See judgment, *ibid.* 394.

(c) See *Yeomans v. Legh*, 2 M. & W. 419 contra.

so that, even supposing his own rent to be in arrear, (which does not appear,) he will have to pay more than he has the means of retaining out of it. It is clear that he would have a remedy to recover this against his father, who is therefore immediately interested in defeating the claim of the defendants.

WILLIAMS, J., concurred.

COLERIDGE, J. It seems to be conceded that liability over to the plaintiff is an interest which will exclude the witness. Here the witness has shown a tenancy between the father and son, as on the *voir dire*. Nor does the competency turn on the question, whether the son has, or has not, paid his own rent. The rents are different, and may be payable on different days, and the plaintiff may have been distrained upon before his own became due.

S.

Rule absolute for a new trial.

SWANN against SUTTON.—p. 623.

To *assumpsit* for goods sold, &c., it is a good plea in bar of further maintenance, &c. that, after action commenced, plaintiff took the benefit of the insolvent debtors' act, 7 G. 4, c. 57, and assigned to the provisional assignee, whereby plaintiff's right of action vested in such assignee.

Replication to such plea, that, after assignment, the provisional assignee had notice of such suit, and permitted it to continue, until he afterwards (and after the above plea pleaded) assigned to other assignees appointed by the Insolvent Debtors' Court; that such assignees afterwards had notice of the suit, and assented to its being continued for the benefit of the creditors; and that it is so continued with their consent and on their behalf as such assignees: Held bad on general demurrer.

ASSUMPSIT for goods sold and delivered, work and materials, and money paid, and on an account stated.

Plea, that plaintiff ought not further to maintain his action, &c., because, after the causes of action accrued, and after the commencement of this suit, to wit, on, &c., plaintiff, then being a prisoner in actual custody, &c., on process for debt, &c., did, according to the act of 7 G. 4, (c. 57,) petition the Insolvent Debtors' Court, for his discharge, and plaintiff did, at the same time of subscribing the said petition, to wit, on, &c., duly execute a conveyance and assignment to Samuel Sturgis, then being the provisional assignee of the said Court, in the form annexed to the statute, of all the estate, right, &c., in and to all the real and personal estate and effects of plaintiff, &c., and all debts due to plaintiff; and, by force of the said act, conveyance, and assignment, all the estate, right, &c., of plaintiff in and to the said debts and causes of action in the declaration mentioned, &c., became and were vested in the said S. Sturgis, as such provisional assignee, on the trusts and for the purposes in the act mentioned. Verification.

Replication. That heretofore, and after the said assignment to S. Sturgis, viz., on, &c., he, the said S. Sturgis, had express notice of this suit commenced and prosecuted against the defendant, and of the cause for which the same had been and was commenced and prosecuted: and that afterwards, and after such notice, to wit, on, &c., and from thence until the making of the indenture herein mentioned, he, the said S. Sturgis, suffered and permitted the said suit to remain and continue pending, and to be prosecuted and carried on by and in the name of

plaintiff. Averment, that afterwards, and after the pleading by defendant of the plea above pleaded, viz. on, &c., William Wallis, and Enoch Blakemore, being creditors of plaintiff at the time of the arrest and commencement of the imprisonment of plaintiff upon which he petitioned, &c., in manner and form aforesaid, were duly appointed in and by the said Court to be assignees of the estate and effects of plaintiff: and that afterwards, to wit, on, &c., by a certain indenture of assignment, bearing date, to wit, &c.: (Assignment by Sturgis to Wallis and Bakemore, of all the estate, right, &c., of, in, and to all the real and personal estate and effects which, by virtue of the conveyance and assignment in the plea mentioned, were in any way vested in S. Sturgis as provisional assignee, habendum to Wallis and Blakemore, in trust for the creditors of plaintiff who should be entitled to a dividend :) that Wallis and Blakemore afterwards, to wit, on, &c., had express notice of the said suit so commenced and prosecuted and depending as aforesaid, and of the cause for which the same had been, and was so commenced and prosecuted, and then expressly assented to the said suit, and that the same and the proceedings therein should be continued and prosecuted by plaintiff for and on behalf of the said W. Wallis and E. Blakemore, as such assignees as aforesaid, and for the benefit of the several persons creditors of plaintiff at the time of the arrest and the commencement of the imprisonment upon which he so petitioned, &c., as aforesaid. Averment, that the same suit is now continued and prosecuted in his name, with the express privity, and approbation, and consent of the said W. Wallis and E. Blakemore, and for and on their behalf as such assignees as aforesaid. Verification.

General demurrer, and joinder.

Crompton, for the defendant. The assignees cannot continue this action in the plaintiff's name; for the sum to be recovered, and the right to sue for it, are vested absolutely in themselves. The plea is unanswered. In *Kinnear v. Tarrant*, 15 East, 622, a similar plea of the plaintiff's bankruptcy, was pleaded to a declaration in scire facias, and held good on demurrer to a replication alleging that the action was continued by the assignees for the benefit of the creditors. The law of that case is recognised in *Biggs v. Cox*, 4 B. & C. 920, (10 E. C. L. R. 471;) and *Baylis v. Hayward*, 4 A. & E. 256, (31 E. C. L. R. 66,) and is supported by the distinction often drawn in cases regarding property acquired after bankruptcy, where it has been held that, in respect of such property, an uncertificated bankrupt may sue in his own name if the assignees do not interfere, but not so if the property was acquired before the bankruptcy. *Drayton v. Dale*, 2 B. & C. 293, (9 E. C. L. R. 91,) is a case of this class; and *Taylor v. Buchanan*, 4 B. & C. 419, 420, (10 E. C. L. R. 376,) and *Lea v. Telfer*, 1 Carr. & P. 146, (11 E. C. L. R. 348,) show that the same principles, as to the bringing of actions, prevail in cases of insolvency as in that of bankruptcy. The statutory provisions in the one case are, in effect, the same as those in the other. *Guinness v. Carroll*, 1 B. & Ad. 459, (20 E. C. L. R. 429,) may be cited, but is no real exception to the rule deduced from the other cases. There a judgment entered up by the plaintiff, after bankruptcy and assignment, on a warrant of attorney given before the bankruptcy, was held to be regular. But the obtaining judgment on a warrant of attorney is a peculiar proceeding; and, as *Patterson, J.* suggested there, "if the warrant of attorney was given to enter up judg-

ment in the bankrupt's name and no other, the assignees could not have made themselves parties in any other way than by using his name." [PATTESON, J. This plaintiff took the benefit of the insolvent act after having commenced the present action. Why may not the assignees go on with the action in his name till final judgment, as was done in *Bibbins v. Mantel*? 2 Wils. 358. 378; *Hewit v. Mantell*, 2 Wils. 372. Before final judgment they cannot have scire facias to put them on the record.] The answer is pointed out in *Kinnear v. Tarrant*, 15 East, 622: the plaintiff, in *Bibbins v. Mantel*, had obtained interlocutory judgment, and a writ of inquiry had been awarded before the bankruptcy; and the action was held to be properly carried on in his name till final judgment, because the defendant had no day in Court, and could no longer plead any thing to the action. *Hewit v. Mantell*. The same reason does not apply here.

Archbold, contrâ. That point was taken in argument in *Kinnear v. Tarrant*; but the judgment does not turn upon it. Nothing, as to the scire facias, had been done in that case before the commission, except issuing process, which was not alleged to have been served when the commission issued. The decision in *Biggs v. Cox*, 4 B. & C. 920, (10 E. C. L. R. 471,) was that the assignees might sue on promises, while an action commenced against the same party by the bankrupt before his bankruptcy, on the same promises, was still depending; and there is no doubt that in such a case assignees may either adopt the bankrupt's action or commence a new one. Indeed it would be hard on assignees to be bound by the bankrupt's action, in which some proceeding might be defective. In *Baylis v. Hayward*, 4 A. & E. 256, (31 E. C. L. R. 66,) where the declaration was in scire facias on a judgment, and bankruptcy of the plaintiff was pleaded, it did not appear that the plaintiff had not become bankrupt before the original action was brought; if so, the assignees could not have commenced that action in the bankrupt's name, though they might have adopted it if commenced by him before the bankruptcy. Where a plaintiff becomes insolvent pending the action, it is a common practice to require security for costs from the assignees, or a creditor, (a) the Courts thus recognising the fact that the suit is carried on for the benefit of the creditors. The alleged reason for allowing assignees to proceed in the name of the bankrupt after interlocutory judgment and not before, namely that the defendant had no longer a day in Court, is not satisfactory, for he might raise the objection by audita querela. In *Waugh v. Asten*, 3 T. R. 437, the plaintiff became bankrupt between interlocutory and final judgment, and afterwards sued out execution in his own name; and, on motion to discharge the defendant out of custody on the ground of irregularity, the answer given by this Court was, "that the bankruptcy of the plaintiff did not abate the suit; and that they had in several instances permitted the assignees to continue a suit commenced by a bankrupt in his name." [PATTESON, J. How do you distinguish the present case from *Minchin v. Hart*?] 1 Chitt. Rep. 215, (18 E. C. L. R. 68.) The assignees there repudiated the action by not giving security for costs. [PATTESON, J. It does not appear that they had refused. And BAYLEY, J., said that the Court would not have ordered security if they had known that the defendant meant to plead the bankruptcy

(a) See *Heaford v. Knight*, 2 B. & C. 579, (9 E. C. L. R. 186;) *Doyle v. Anderson*, 2 Dowl P. C. 596.

of the plaintiff.] The pleadings in that case had not gone on to a replication, as here. And it does not appear what the nature of the action was: it might have been one which the assignees could not adopt. The judgment of the Court of Common Pleas in *Bibbins v. Mantel*, 2 Wils. 358, (a) is an authority in favour of the plaintiff; and the reporter there adds, "*Nota*, there is no case on the point to be found in the books; but the statute 21 Jac. 1, c. 19, enacts, that the laws against bankrupts shall be in all things largely and beneficially construed for the relief of the creditors." *Kretchman v. Beyer*, 1 T. R. 463, is also in the plaintiff's favour. There the defendant below brought a writ of error, which was duly issued, allowed, and served; the plaintiff below became bankrupt; the assignees sued out a scire facias; and this Court quashed the sci. fa., saying, "the assignees should have gone on with the writ of error in the bankrupt's name till judgment." *BULLER, J.*, there stated the rule to be, "that the assignees cannot make themselves parties to the record in any intermediate stage of the proceeding, but it must be immediately after judgment; though an interlocutory judgment is sufficient for that purpose." *Guinness v. Carroll*, 1 B. & Ad. 459, (20 E. C. L. R. 429,) is a clear authority for the plaintiff. There the action was brought in the plaintiff's name on a judgment signed after he became bankrupt; the defendant pleaded bankruptcy of the plaintiff and assignment of his effects before judgment signed; and this Court held the pleas bad. The judgment was upon a warrant of attorney to enter up judgment on a bond; and Lord TENTERDEN said: "The assignee might avail himself of the warrant of attorney, and enter up judgment in the bankrupt's name, or he might, as assignee, sue in his own name upon the bond. By taking one remedy he would waive the other; and if he did not sue upon the bond, it cannot be supposed but that he meant to take the benefit of the warrant of attorney. It is immaterial to the defendant in which way the debt is recovered." [Lord DENMAN, C. J. Suppose the insolvent here were to obtain judgment, and the assignees were then to bring another action on the same promises.] The answer would be that this action was under the control of the assignees. [Lord DENMAN, C. J. The defendant does not know that.] The same observation might have been made in *Bibbins v. Mantel*, 2 Wils. 358, and *Waugh v. Austen*, 3 T. R. 437. But the defendant may ascertain the fact. He may call on the assignees to give security for costs. The Insolvent Debtors' Act, 7 G. 4, c. 57, and the bankrupt acts, are not so far analogous as was suggested on the other side. Stat. 6 G. 4, c. 16, s. 63, adopted from stat. 1 Jac. 1, c. 15, s. 13, disables the bankrupt, after assignment, from recovering or releasing any debt due to him: stat. 7 G. 4, c. 57, does not go so far in any of its provisions.

Crompton, in reply. *Kinnear v. Tarrant*, 15 East, 622, did not at all turn (as has been suggested) upon the state of the cause as to service of process. And the observation on that subject does not apply to *Minchin v. Hart*, 1 Chitt. Rep. 215, (18 E. C. L. R. 68.). This last case shows that the practice as to security for costs does not affect the right of a defendant to plead the bankruptcy of the plaintiff. It is said that the assignees there had repudiated the action; but that does not appear. They might have come in and replied to the plea of bankruptcy, as in the present case. Lord TENTERDEN did say, in *Guinness v. Carroll*,

(a) See *Hewit v. Mantell*, 2 Wils. 372.

that the assignee might proceed in the bankrupt's name; and no doubt he might, but not if a plea of bankruptcy were pleaded. In *Kinnear v. Tarrant*, the earlier cases now cited were under consideration, and in *Biggs v. Cox*, 4 B. & C. 920, (10 E. C. L. R. 471,) BAYLEY, J., observes that the judgment of the Court in *Kinnear v. Tarrant*, "corrected the former decisions in which it was held that assignees might continue suits commenced by the bankrupt, and decided that defendants might insist upon stopping such suits, and force the assignees to become plaintiffs, so that it might appear upon the record to whom the payment compelled by the judgment was made." (He was then stopped by the Court.)

LORD DENMAN, C. J. I think this plea is good, and not answered. Since the plaintiff brought his action, all his rights have been transferred by the insolvency; and the defendant is at liberty to plead that fact. The practice as to security for costs leaves the right untouched.

LITLEDALE, J. The authorities show that an insolvent could not commence an action after his insolvency; and, if so, neither can he continue it. In *Kinnear v. Tarrant*, the plea was clearly good, supposing the requisite steps to have been taken for bringing a scire facias, before the bankruptcy. In *Minchin v. Hart*, the plea of bankruptcy was held good; and in *Bretherton v. Osborne*, 1 Dowl. P. C. 457, before me, the sufficiency of such a plea was not disputed. The plaintiff has, by taking the benefit of the Insolvent Debtor's Act, disabled himself from continuing the suit; and that is a good defence. A distinction was suggested between the insolvent and bankrupt acts; but all the rights of action are transferred in the one case as well as the other.

PATTESON, J. The argument for the plaintiff proceeds on the supposition that the practice of obliging assignees to give security for costs deprives a defendant of his right to plead the bankruptcy or insolvency. But the practice cannot take away the legal right of pleading such a defence.

WILLIAMS, J., concurred.

Judgment for defendant.

CALVERT against MOGGS.—p. 632.

Debt for goods sold and delivered, money had and received, and on an account stated. Plea, nil debet (pleaded before Reg. Gen. Trin. 1 Vict., requiring the words "by statute.") Special demurrer. Held that, since the new rules of pleading, the plea could, under no circumstances, be good as to the last count; and that, being pleaded to the whole declaration, it was bad for the whole.

DEBT for goods sold and delivered and money had and received, and on an account stated. Plea, nil debet, (in the common form.) Demurrer, assigning for special cause, that the plea of nil debet is, by the new rules of pleading, not allowed in any action, Reg. Gen. Hil. 4 W. 4, *Pleadings in Particular Actions*, II., 5 B. & Ad. viii. The plea was pleaded before Reg. Gen. Trin. 1 Vict., 8 A. & E. 279, requiring the words "By statute" in the margin.

Wightman, for the plaintiff. The new rules of pleading expressly prohibit the plea of nil debet to an action of debt; and *Smedley v. Joyce*, 2 C. M. & R. 721, shows that advantage may be taken of this objection upon demurrer. [PATTESON, J. If it is no plea, why not take judg-

ment by default?] It is dangerous to do so. The plea may be good as to part of the declaration.

Peacock, contra. The plea, if bad at all, is only bad by reason of the late rules of pleading. The plaintiff, therefore, ought to have gone before a judge to strike it out, and not to have demurred. Upon summons he might have called on the defendant to show whether he pleaded nil debet by virtue of any statute. *Earl Spencer v. Swannell*, 3 M. & W. 154, shows that the plea of nil debet is still pleadable in some cases. If we suppose (as the fact is) that the defendant is a surveyor of highways sued for the value of materials taken by him for repairs of roads by virtue of sect. 51 of the General Highway Act, 5 & 6 W. 4, c. 50, then he has a right to plead the general issue under sect. 109 of the same act. The plaintiff has waived the tort, and sues for goods sold, as he may do, if he can prove his property in the materials; *Lee v. Shore*, 1 B. & C. 94. 97, (8 E. C. L. R. 30,) and the judgment of *ABBOTT*, C. J., in that case. But such waiver will not deprive the defendant of the benefit of the statute. [*Wightman*. There is a count, on an account stated, to which the statute cannot possibly apply.] It is enough, on demurrer, if there be any supposable case, in which the plea would be good by statute. Now, under sect. 111, the surveyor may employ an attorney to defend prosecutions against the parish, and the plaintiff may be such an attorney, and may now be suing the defendant on a settlement of accounts between them. Besides, the demurrer is too large; for the plea must be taken as pleaded separately to each count. Now if the plea be good as to one, the plaintiff should have demurred to it so far only as it applied to the other; *Spyer v. Thelwell*, 2 C. M. & R. 692; *S. C. Tyrwh. & Gr.* 191; *Webb v. Baker*, 7 A. & E. 841, (34 E. C. L. R. 240. (a))

Wightman, in reply. The provision of such a statute, which gives the defendant the benefit of the general issue, cannot apply to a case like this. [*LITTLEDALE*, J., referred to *Irving v. Wilson*, 4 T. R. 485, and *Greenway v. Hurd*, 4 T. R. 553.] An account stated, under the circumstances suggested, could not be within the protection of the statute. The provisions respecting the laying of the venue, and tendering amends, are inapplicable to such a state of things. The plea, being disallowed, except in certain cases, is *prima facie* bad; and the defendant cannot be allowed to support it by suggesting possible circumstances, *dehors* the record, under which the plea may be admissible. There should be some suggestion, or allegation on the record, to show that the defendant is availing himself of a statute; otherwise a demurrer will always be bad, where the plea may, by possibility, be a good one. In fact, it will be useless to demur at all to any plea of the general issue. [*PATTERSON*, J. Suppose a defendant were now to add to such a plea the words "by statute." How could we deal with it on demurrer?] If it were a mere trick, the plaintiff might go before a judge to make the defendant show what statute was meant. But here there is nothing to indicate that the defendant relies on one at all. At all events, if the count upon an account stated be one to which the plea of nil debet must, under any circumstances, be inadmissible, then the plea, being pleaded to the whole declaration, is bad.

LORD DENMAN, C. J. An action upon an account stated could never have been contemplated by the 109th section of 5 & 6 W. 4, c. 56.

(a) See *Hartshorne v. Watson*, 4 New Ca. 178, (33 E. C. L. R. 312.)

Then, the plea being pleaded to the whole declaration, the defendant cannot object that the demurrer goes to the whole plea.

LITLEDALE, PATTESON, and WILLIAMS, Js., concurred.

Leave to amend the plea within a week
on an affidavit of merits, otherwise

S.

Judgment for the plaintiff.

SKUSE against DAVIS.—p. 635.

Trespass for assault and battery; Plea, that plaintiff had complained of the same trespass to two justices, according to stat. 9 G. 4, c. 31, s. 27, who had dismissed the complaint, and, thereupon did, "according to the said statute, forthwith make out a certificate," "stating the fact of such dismissal," and delivered it to defendant, whereby defendant was released, &c.

Held, on special demurrer, that the plea was bad for not showing that the complaint had been dismissed upon one of the grounds specified in sect. 27; and, *semble*, the certificate itself ought to show the ground of dismissal.

TRESPASS for assaulting and beating the plaintiff. Venue, Surrey.

Plea, that the trespasses were committed after the passing of stat. 9 G. 4, c. 31, and amounted to no more than a common assault and battery within the meaning of that act; and that, after the commission of the trespasses, upon complaint of plaintiff then made by him of the said trespasses, according to the said statute, defendant was summoned and appeared before G. O. and A. O., then being justices of the peace, &c., in and for the county of Surrey; and thereupon the said, &c., so being such justices, did then dismiss the said complaint upon the hearing thereof, and thereupon did then, according to the said statute, forthwith make out a certificate under their hands, stating the facts (a) of such dismissal, and did then deliver such certificate to the defendant; whereby, and by force of statute, defendant became, and still is released from this action so far as relates to the said trespasses, &c. Verification.

Demurrer, for that it did not appear on what ground the complaint was dismissed; whether because the assault was not proved, or was justified, or was so trifling as not to deserve punishment; or because the justices had no jurisdiction. That the jurisdiction of the justices did not appear in the plea, inasmuch as it did not appear that the trespasses were committed in Surrey. That it did not appear that plaintiff caused defendant to be summoned before the justices, or that defendant was summoned before them. That it was not positively stated, but only by way of argument and inference, that the justices had heard the complaint, or heard or examined the plaintiff, or witnesses in his behalf. That the tenor and effect of the certificate ought to have been set out, whereby the Court might judge of the sufficiency of it to bar the plaintiff; and that the facts of such dismissal, alleged to have been stated in the certificate, ought to have been set forth.

Byle, for the plaintiff. The plea ought to have set forth the tenor or effect of the certificate, so as to show upon what grounds the complaint was dismissed; for it is only a bar when dismissed on certain grounds. Sect. 27 of stat. 9 G. 4, c. 31, provides that where complaint is made before two justices of a common assault or battery, "if the justices, upon the hearing of any such case of assault or battery, shal.

(a) See post, p. 638, note (a).

deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of *such* dismissal, and shall deliver such certificate to the party against whom the complaint was preferred." Sect. 28 enacts that any person who obtains such certificate, or, being convicted, shall have paid the fine or suffered the imprisonment awarded for non-payment, shall be released from all further proceedings, civil or criminal, for the same cause. Sect. 29 provides that in case the justices shall find the assault or battery to have been accompanied by an attempt to commit felony, or shall be of opinion that it is a fit subject for an indictment, they shall abstain from any adjudication thereupon, and shall deal with the case as before the passing of the act; and there is a further proviso that the act shall not authorize justices to hear and determine a case in which any question shall arise as to the title to lands, &c., or as to bankruptcy or insolvency, or execution under process. Hence it appears that a certificate is no defence unless in the case of dismissal upon one of the three grounds mentioned in sect. 27, viz., want of proof; a justification; or the trifling nature of the offence. Here no such grounds are stated in the plea, or alleged to have been set forth in the certificate. The complaint may have been dismissed on one of the grounds referred to in sect. 29. [PATTESON, J. The justices are not to give a certificate in cases within sect. 29. Your argument, therefore, supposes that they have acted irregularly in this respect.] Nothing is to be presumed in support of the acts of an inferior jurisdiction. [He then argued that the plea should have shown the offence complained of to have been committed within the jurisdiction of the justices of the county of Surrey; and he cited *Helier v. Hundred de Benhurst*, Cro. Car. 211; 2 Hale P. C. 50, 51, and 5 & 6 W. 4, c. 19, s. 38. Upon that point it became unnecessary to give any judgment; but the Court intimated an opinion, that as the venue was laid in Surrey, and the justices were alleged in the plea to have been justices for that county, it must be presumed that the assault was committed within their jurisdiction; and that, at all events, they were the justices before whom the plaintiff had chosen to make his complaint.]

M. Chambers, contra. The plea exactly follows the words of the act. Though it requires a certificate stating "the *fact* of such dismissal," it does not require the *facts* (a) to be stated, upon which the dismissal was founded. Where a statute requires notice of an appeal, general notice is sufficient, unless the statute also requires the cause or ground to be specified. The certificate is alleged to have been made "according to the statute," that is, legally and regularly; and the complaint is also stated to have been so made; it is, therefore, to be presumed that all was regular, and that the case was one in which a certificate was proper. The rule, "*omnia præsumentur ritè acta*," applies, and the intendment must be in favour of the justices who gave this certificate. If the dismissal took place on any of the grounds mentioned in sect. 29, or for want of jurisdiction, the plaintiff ought to have stated that in a replication. But, in fact, no certificate at all would be grantable in those cases. Credit must be given to the justices for the

(a) The word used in the plea was "*facts*;" but this was stated by defendant's counsel to be a mistake for "*fact*."

regularity of their acts, for they do not constitute what is usually called an inferior court, but a tribunal of a special nature, established by statute for certain purposes.

Byles, in reply. The words "*such* dismissal" mean a dismissal under the special circumstances particularized by the statute. The certificate, therefore, ought to specify the circumstances, otherwise the party has no means of knowing whether it is, or is not, a bar to further proceedings; for the justices are not bound to assign reasons for their judgment upon a complaint. If the certificate does not state the ground of dismissal, neither plaintiff nor defendant can tell the effect of it, or whether it be a legal certificate or not.

LORD DENMAN, C. J. The defendant does not bring himself within the protection of the statute, unless he shows the certificate to be legal and regular. The statute directs the justices to grant a certificate upon a dismissal in three cases only. Unless it be granted upon one of the grounds specified in the act, it is ineffectual; therefore it ought to show the ground upon which it is given, otherwise neither party can know whether it is a bar or not.

PATTESON, J. (a) I was at first inclined to think that the legal presumption in favour of the acts of the justices was sufficient to support the plea. But, upon consideration, I think we are bound to give some effect to the word "*such*." "*Such* dismissal" must mean a dismissal on one of the grounds mentioned in sect. 27; and the certificate ought, therefore, to state that the complaint had been dismissed upon one of those grounds.

WILLIAMS, J. In the case of justices of the peace, their acts cannot be presumed to be legal and regular until their jurisdiction is shown. There are only three cases in which their certificate will have the effect of protecting the defendant from an action; it ought, therefore, to appear to have been given on one of those three occasions.

Judgment for the plaintiff.

M. Chambers then asked leave to amend, but,

Per Curiam. We never allow an amendment after argument.

S.

(a) Littledale, J., was absent.

ALLEN against FLICKER and Another.—p. 640.

Stat. 57 G. 3, c. 93, regulating the costs of distresses for rent not exceeding 20*l.*, has not repealed the provisions of 2 W. & M. sess. 1, c. 5, so as to make an appraisement by one broker sufficient upon such distress.

CASE for distraining goods of the plaintiff for rent in arrear, and selling them without having the same previously appraised by two sworn appraisers, contrary to the form of the statute, &c.

Plea, that the arrears of rent so distrained for at the time of the distress amounted to less than 20*l.*, to wit, 1*l.* 12*s.* 6*d.* only; wherefore defendant did not cause the said goods to be appraised by two sworn appraisers. Verification.

Demurrer, assigning for causes that the plea attempted to raise an immaterial issue, namely, that the arrears of rent were under 20*l.*; that the fact of the arrears not exceeding 20*l.* was no defence; and that the plea amounted to a plea of not guilty. Joinder.

Heaton for the plaintiff. The principal question is, whether stat. 2 W. & M. sess. 1, c. 5, s. 2, which requires two sworn appraisers to value goods distrained, is repealed as to distresses for rent not exceeding 20*l.* by stat. 57 G. 3, c. 93. The last statute enacts that no person making a distress for such rent, nor any person employed in making it, or doing any act in the course of such distress, shall receive out of the produce, or from the tenant, or landlord, or from any other person, any more costs and charges for such distress or other matter, than such as is fixed and set forth "in the schedule hereunto annexed." The schedule fixes 6*d.* in the pound for the appraisement, "whether by one broker or more." *Fletcher v. Saunders*, 1 Moo. & R. 375, will be relied upon to show that one broker is enough. But *Bishop v. Bryant*, 6 C. & P. 484, before TINDAL, C. J., is to the contrary. The schedule is no part of the act itself, but only annexed to it, and is, moreover, not inconsistent with the first act; for a single broker, or even no broker at all, may be employed by consent.

O'Malley, contra. The last act is an extension of the powers of the first for the benefit of both parties, and in reduction of the expense of distresses. [PATTESON, J. The tenant will only have to pay 6*d.* in the pound, whatever be the number of brokers. It is, therefore, no benefit to the tenant, but to the landlord, that one only should be employed.] The schedule which is engrafted on the act, evidently contemplates the employment of one broker, and can hardly be construed to refer to a case of irregular appraisement by consent, where parties are in a condition to arrange both the number of appraisers and expense of valuation. *Fletcher v. Saunders* is in point, and was not questioned by any motion before the Court above.

LORD DENMAN, C. J. It is clear to me that the act of 2 W. & M. c. 5, is in full force. The schedule of 57 G. 3, c. 93, probably refers to the case of the employment of a single appraiser by consent; but, at all events, it is too loosely worded to operate as a repeal of the former act.

PATTESON, J.(a) It is possible that the latter act may have been framed with the object ascribed to it, of relieving parties from the expense of two brokers; but it would be giving too much effect to the loose words in the schedule, if we were to decide that they had repealed the positive directions of the preceding act. It might as well be argued that none but brokers can now be employed to appraise the goods distrained, because none but brokers are named in the same schedule.

WILLIAMS, J. concurred.

Judgment for the plaintiff.

S.

(a) Littledale, J., was absent.

FRANCIS against BAKER.—p. 642.

Assumpsit for money paid. Plea, that the money was paid by plaintiff as agent for defendant in the purchase of railway shares; that plaintiff thereupon received certificates of the title of said shares, and ought to have delivered them to defendant, but refused to do so, and afterwards wrongfully converted them to his own use, whereby the shares and certificates became lost to defendant: Held, that the plea was bad, inasmuch as it either amounted to the general issue, or alleged matter that was no avoidance of the contract, but only ground of a cross action.

INDEBITATUS assumpsit for money paid for the use of defendant at his request. Plea, as to 100*l.* parcel, &c., that the same was money

paid in and for the purchase of certain railway shares by plaintiff as agent for defendant; and that plaintiff, after such payment, had thereupon delivered to him as such agent, and received as such agent, the certificates of title of the said shares for defendant, and ought, as such agent, to have delivered the same to defendant, in order that defendant might have sold and disposed of the shares to his own use and benefit; but that plaintiff refused so to do; and after the said payment for such shares, and before the commencement of the suit, to wit, on, &c., wrongfully and in breach of his duty as such agent, converted the certificates to his own use, whereby the said shares and certificates became lost to defendant. Verification.

Demurrer, for that the plea amounted to the general issue; that it admitted 100*l.*, payable to plaintiff on request, and that a breach of duty in a separate transaction was no satisfaction; that if the delivery of the certificate was a condition precedent, then 100*l.* did not become payable on request; that the plea was an argumentative denial that it was so payable, and, as such, amounted to the general issue; that defendant's liability to pay could not be discharged by a subsequent wrongful conversion by plaintiff, not proceeding from any fraud committed in the original accruing of the debt; that plaintiff had a right of action, if he acted legally and bona fide in making the payment, which was to be presumed; that the plea should have stated that the shares were of some, and of what value, and that defendant was damnified; that it both denied the debt and also avoided it by a discharge, &c. Joinder.

There was another plea, differing in some respects from the above, to which the plaintiff had also demurred; but as it was admitted in argument that the decision of the Court must be the same on both, this part of the pleadings has been omitted.

Channell, for the plaintiff. The plea either is an argumentative denial that the money was paid under circumstances to enable the plaintiff to sue for it, and therefore amounts to the general issue; or is pleaded in confession and avoidance, in which case it admits the money to have been paid, yet shows no discharge or avoidance. It admits a payment by the plaintiff of the purchase-money of shares belonging to the defendant, and sets up a conversion of the certificates as an excuse for refusing to repay the plaintiff. If it means that the defendant has received no benefit from the purchase of the shares, this is a defence under non assumpsit; *Cousins v. Paddon*, 2 C. M. & R. 547. If it means that the plaintiff has improperly detained the certificates, this is only matter for a cross action. The plea was probably framed to invite a replication of de injuriâ, which would have been bad if the plea amounts to the general issue; *Parker v. Riley*, 3 M. & W. 230.

Wightman, contra. This is a plea in confession and avoidance. It admits a payment for the defendant's use at his request, but states matter ex post facto to show that the payment has become useless by reason of the detention of the certificates. It is not denied that the payment was originally of value to the defendant; but it is contended that he cannot be called upon to pay for that which the plaintiff will not deliver to him. Suppose the plaintiff bought a horse for the defendant, and shot it as soon as the purchase-money was paid, could he sue the defendant for money paid? It would be a great injustice to put the defendant to the circuitous remedy of an action of trover under such circumstances. *Fisher v. Samudu*, 1 Camp. 190, is, in

principle, in favour of the plea. In *Cole v. Le Souef*, 5 Dowl. P. C. 41, (a) in an action for money paid, the Court of C. P. inclined to the opinion that a special plea, stating that the insurances, effected by the plaintiff for the defendant, were invalid through the plaintiff's negligence, was good on special demurrer.

LORD DENMAN, C. J. The dilemma is not to be got rid of. The plea either denies the payment under circumstances to give any cause of action, and therefore amounts to the general issue; or it confesses, and seeks to avoid it, by subsequent matter, which is only ground of a cross action. In fact, the plea does not avoid the contract at all. The damages arising from the detention of the certificates may be greater or less than the amount of the purchase-money.

PATTESON, J. (b) The plea is a novelty, not in its facts, but in its principle; and no sufficient authority has been adduced to support it. In *Cole v. Le Souef*, 5 Dowl. P. C. 41, there was no decision; but I incline to think that the plea in that case amounted to non assumpsit. There, however, the policies were never of any value to the defendant; here the shares vested in the defendant, and were, at least, of value till the subsequent conversion by the plaintiff. The conversion of the certificates was either ground of an action of trover, or, perhaps, of a set-off.

WILLIAMS, J. Many matters may now be shown or pleaded as a defence, which were formerly considered only the subjects of a cross action; but in all those cases the defence arises out of the terms of the very contract upon which the plaintiff sues. Here the subject of the plea is matter subsequent to, and dehors the contract, and is merely tortious.

S.

Judgment for the plaintiff.

(a) The plea was pleaded to a count upon an account stated, as well as money paid.

(b) Little Dale, J., was absent.

BARRY against ARNAUD.—p. 646.

A collector of customs, appointed by the commissioners under stat. 3 & 4 W. 4, c. 51, s. 6, to collect duties on articles coming into the kingdom, and, on payment, sign bills of entry which, by sect. 18, are a warrant for delivery of such articles to the party paying, is not a mere servant of the commissioners, but a substantive and immediate officer of the crown; and his functions, as collector, are ministerial. Therefore, he is liable in an action for nonfeasance in the exercise of his office; as for refusing to sign such bill of entry without payment of an excessive duty. The term "wreck" in stat. 3 & 4 W. 4, c. 52, s. 50, is not necessarily limited to goods which become forfeit to the crown or its grantee by not being claimed within a year and a day, according to stat. Westminster 1, (3 Ed. 1, c. 4.)

Goods were imported into this country, warehoused, entered for exportation, and shipped for Belgium; the vessel was lost within the English port, and the goods, being partly thrown upon the shore, and partly found floating on the sea and landed, were conveyed to the warehouse of the lord of the manor, and immediately claimed by the owner. Held, that they were chargeable with duty as "wreck, brought or coming into the United Kingdom," within stat. 3 & 4 W. 4, c. 52, s. 50.

The following case was stated by consent, under a judge's order, for the opinion of this Court:—

This action is brought by the plaintiff, a merchant of London, against the defendant, who was the collector of his late Majesty's customs, and employed in the said duty of collector by the order and with the concurrence of the commissioners of his said late Majesty's customs for the

port of Liverpool, for refusing, on the 6th day of August, 1836, to accept from the plaintiff the sum of 144*l.* 12*s.* 8*d.*, the same then being (as the plaintiff alleges) the full amount of the customs duty then due and payable to our lord the late King upon the delivery for home consumption of certain foreign goods, to wit, 38,569 pounds' weight of unmanufactured tobacco, then being the property of the plaintiff, which had before then been brought or come into the United Kingdom, and were then deposited in certain warehouses at Liverpool, and for refusing to sign a bill of entry of the said tobacco upon the due payment of the said sum, whereby the plaintiff was prevented from obtaining the delivery of the said tobacco from the said warehouse, and from selling and disposing thereof to great advantage: and the defendant having pleaded Not Guilty, and issue having been joined thereon, the parties have agreed to the following case.

In or about March, 1836, the tobacco in question amounted to 38,569 pounds' weight, having been, together with a certain other quantity of the same, now lost, imported into Great Britain from the place of its growth, and warehoused in certain warehouses at Liverpool, in the county of Lancaster, being then the property of W. & J. Brown & Co.; was duly entered for exportation from the port of Liverpool by Joseph Johnstone, consigned to J. Parswell Pilgrim, Esquire, at Antwerp, in the kingdom of Belgium, and then shipped on board a ship called the London Packet, bound for Antwerp; with which tobacco the said ship sailed on the said intended voyage: but, shortly after leaving Liverpool, viz., on or about the 29th day of the said month of March, the said ship, after she got out of the limits of the port of Liverpool, met with contrary winds and bad weather, and was thereby forced and compelled to re-enter the limits of the said port, when and where she struck on certain sands in the Irish Sea within the said limits, and was broken to pieces and became a total wreck, and all persons on board were drowned; but the tobacco in question, which formed part of the said ship's cargo, was saved; that is to say, some of it was found floating on the sea, and the remainder was thrown on the shore of the English coast by the sea, and was conveyed to the warehouse of Mr. Atherton, the lord of the manor, into which the said tobacco was brought or came as aforesaid; and the said tobacco was afterwards conveyed to a certain warehouse at Liverpool, where it was sold on the 12th day of April, 1836, by the order of the said Joseph Johnstone, with the consent of the proper officers of his said late Majesty's customs in that behalf: and the proceeds were applied first to the payment of salvage and other usual charges, and then to the benefit and partial relief of the underwriters, who had insured the same against loss by perils of the sea; and the plaintiff, being the highest bidder for it, became the purchaser of the same.

Unmanufactured tobacco was, on the 6th day of August, 1836, subject to a duty of customs on importation into the United Kingdom of 3*s.* per pound; but on that day the tobacco in question had, by the absorption of sea water, increased in weight in the proportion of 60 per cent. In consequence of the damage it had thereby sustained under the circumstances hereinbefore detailed, it could not be sold for a sum amounting to 3*s.* per pound on its then weight, and was not in fact worth more than a total sum of 2892*l.* 13*s.* 6*d.*

By stat. 3 & 4 W. 4, c. 52, s. 50, it is enacted, "that all foreign

goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to: (a) "Provided, also, that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor or other person entitled to receive the same, and shall be deemed to be unenumerated goods." (b) And by stat. 3 & 4 W. 4, c. 56, schedule "Inwards," unenumerated goods, unmanufactured, are subject only to an ad valorem duty of 5*l.* for every 100*l.* of the value.

The defendant was, at the time of the tender hereinafter mentioned, the collector of his late Majesty's customs for the port of Liverpool, and employed in the said duty of collector by the order and with the concurrence of the Commissioners of his said Majesty's customs. His duty was to collect the proper amount of duty on each article for which an entry was tendered, and, upon such duty being paid, to sign a bill of entry acknowledging the receipt, and which then became a warrant authorizing the delivery of such article from the charge of the proper officers.—He had not, according to the proper course of his office, the actual custody of, or control over, the articles upon which the duty was payable, nor had he in fact the actual custody of, or control over, the tobacco in question; except that the officers who had such actual custody and control might not deliver the article to the owner without such bill of entry being so signed.

On the 6th day of August, 1836, the plaintiff tendered to the defendant the sum of 144*l.* 12*s.* 8*d.*, as and for the customs duty due on the said tobacco on its being entered for home consumption, being at and after the rate of 5*l.* for every 100*l.* of the value of the said tobacco, and tendered to the defendant the usual bill of entry for the signature of the defendant, with two duplicates of the said bill of entry duly made and written, at the same time offering to deliver to the defendant as many more duplicates of the same as he should require; when the defendant refused to accept the said sum of 144*l.* 12*s.* 8*d.* in discharge of the customs duties due and payable in respect of the said tobacco, and also refused to sign the said bill of entry acknowledging the receipt, without which signature the officer having the custody of the tobacco could not deliver it to the plaintiff.

The questions for the opinion of the Court are: 1. Whether the tender was sufficient: and, if so, then, 2. Whether the defendant is liable to this action under the above circumstances. If the Court shall be of opinion in the affirmative on both the questions, then judgment to be entered for the plaintiff for the damages laid in the declaration to secure the delivery of the said tobacco to the plaintiff, on payment by the plaintiff to the Crown of the said sum of 144*l.* 12*s.* 8*d.*; and also to secure the payment of costs and of such further sum for damages as shall or may be awarded to the plaintiff by, &c. [The case

(a) The words immediately following are: "Provided always, that if, for ascertaining the proper amount of duty so payable, any question shall arise as to the origin of any such goods, the same shall be deemed to be of the growth, produce, or manufacture of such country or place as the commissioners of his Majesty's customs shall upon investigation by them determine: Provided also, that if any such goods be of such *sorts* as are entitled to allowance for damage, such allowance shall be made under such regulations and conditions as the said commissioners shall from time to time direct: Provided also, that all such goods as cannot," &c.

(b) "And shall be liable to and be charged with duty accordingly."

then named an arbitrator.] But if the Court shall be of opinion in the negative on either question, then the judgment to be entered for the defendant with costs.

The case was argued in last Easter term.^(a)

Channell, for the plaintiff. First, the tender was proper. The goods, if imported, would have been subject to a duty of 3s. per pound; and the attempt is to claim that. If they were wreck, they fall within stat. 3 & 4 W. 4, c. 52, s. 50, by which foreign goods, derelict, jetsam, flotsam, and wreck, are subjected to the same duties as goods of the like kind imported, but with the proviso that, when they cannot be sold for the amount of duty, they shall be deemed "unenumerated goods;" and these, by stat. 3 & 4 W. 4, c. 56, Schedule, entitled "Duties of customs inwards," are subject only to the duty of 5*l.* for every 100*l.* of the value. The tobacco in question was wreck, and could not be sold for the amount of the duty on imported goods; and 5*l.* for every 100*l.* of the value was tendered.

It will be contended that the tobacco was not wreck; and it certainly was not so in the more strict sense, which applies to goods becoming the absolute property of the crown by non-claim within a year and a day, under stat. Westminster 1, 3 Ed. 1, c. 4. But the term has a larger sense, in which it signifies all goods cast on shore by the sea from a vessel suffering shipwreck; and this is its meaning in stat. 3 & 4 W. 4, c. 52, s. 50. This subject, and the authorities upon it, were discussed in *The Bailiffs, &c., of Dunwich v. Sterry*, 1 B. & Ad. 831,^(b) where the two meanings now pointed out were insisted upon at the bar, and, in effect, recognised by the Court, it being held that the grantee of "wrecks of the sea" had, as such, a special property in goods washed on shore from a shipwrecked vessel, before the lapse of a year and a day, (within which time the owner claimed,) and before seizure; and might maintain trespass, in respect of such property, against a wrong-doer. The Court there said "that the plaintiff had a special property in, and consequent right of action for the taking of, the cask in question: and that it was wreck within the meaning of that term in the law, so as to entitle the grantee to seize it; though it was not 'wreck,' so as to become finally his absolute property, in which sense that word is used in some of the text writers, and in the statute of Westminster the first." The larger sense is recognised in the commentary on stat. Westminster 1, 2 Inst. 167, where Lord COKE says that "wreck" "in legal understanding is applied to such goods as after shipwreck at sea are by the sea cast upon the land:" and again, in p. 168, (cited Com. Dig. *Wreck* (A),) that the "year and day shall be accounted from the seizure made as wreck." So in *Constable's Case*, 5 Rep. 106 a, it is said, p. 107 b, that "the year and day in case of wreck, shall be accounted from the taking or seizure of them as wreck; for although the property is in law vested in the lord before seizure, yet until the lord seizes, and takes it into his actual possession it is not notorious who claims the wreck, nor to whom the owner shall repair to make his claim, and to show to him his proofs:" and, in p. 108 b, "Note, that wreck is estray on the sea coming to land, as estray of beasts is on the land coming within any privileged place." In *Molloy De Jure Maritimo*, book 2, c. 5, s. 6,^(c) "wreccum maris"

^(a) April 26th, 1839. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, J.

^(b) And see *Sutton v. Buck*, 2 Taunt. 302, there cited.

^(c) Vol. i. p. 390, 10th ed.

is stated to mean "such goods only as are cast and left upon the land by the sea:" and in s. 8,(a) it is said that, "if goods are cast up as a wreck, and it falls out they be *bona peritura*, the sheriff may sell them within the year, and the sale is good; but he must account to the true owners. The same section goes on to point out how owners claiming "the wreck" shall proceed, saying that, if an action at law is commenced, it must be brought within the year and day.

Then, if the term "wreck" has two senses, in which of them is it used in stat. 3 & 4 W. 4, c. 52, s. 50? Those claiming the duty must ascertain this precisely, because wrecked goods can be rendered liable to the customs only by some express enactment. The schedule of stat. 3 & 4 W. 4, c. 56, laying duties on imported goods, cannot affect these, Molloy says, (book 3, c. 5, s. 9.) (b) "If goods were wrecked on the shore, and the lord having power, takes them, he shall not pay custom, neither by the common law, nor by the statute; for at the common law, wrecked goods could not be charged with custom, because at the common law all wreck was wholly the king's, and he could not have a small duty of custom out of that which was all his own; and by Westm. 1, where wrecked goods belonged more to another than to the king, he shall have it in like manner, that is, as the king hath his:" and *Shepard v. Gosnold*, Vaugh. 159,(c) is cited. Again: "Wrecked goods are not brought into the kingdom, being cast on shore, as merchandise, viz. for sale; but are as all other the native goods of the kingdom, indifferent in themselves, for sale or other use at the pleasure of the proprietor." And accordingly, by stat. 52 G. 3, c. 159, s. 1, after reciting that "doubts have arisen whether foreign liquors and tobacco derelict, jetsam, flotsam, lagan or wreck, brought or coming into this kingdom, are by the laws now in force subject and liable to the payment of duties;" all such liquors, &c., are subjected to the same duties as liquors, &c., of the like kind regularly imported; and duties have been laid upon wrecked goods by other subsequent enactments. Now, looking to the provisions of stat. 3 & 4 W. 4, c. 52, s. 50, it would seem to have been the object to tax goods coming on shore without the will of the owner, as distinguished from those intentionally brought in as merchandise; but, if that section be construed as the defendant proposes, a duty is exacted only if the goods are wreck in the stricter sense; where property is cast ashore, and an owner appears within the year and day, no duty attaches. This cannot have been contemplated. "Wreck," in sect. 50, is associated with goods derelict; and this term, as appears by the judgment of Sir W. SCOTT in the case of *The Aquila*, 1 Robinson's Adm. Rep. 37, admits the supposition that there may be an owner. Again, sect. 51 enacts "that if any person shall have possession of any such goods," (thus referring directly to the "goods derelict, jetsam, flotsam, and wreck," mentioned in the preceding section,) "and shall not give notice thereof to the proper officer of the customs within twenty-four hours after such possession, or shall not on demand pay the duties due thereon, or deliver the same into the custody of the proper officer of the customs, such persons shall forfeit," &c.; "and in default of the payment of the duties on such goods within eighteen months from the time when the same were so deposited, the same may be sold," as on like default in the case of goods imported: "provided always, that any lord of the manor having by law just claim

(a) Page 391.

(b) Vol. i. p. 392, 393, 10th ed.

(c) See p. 164.

to such goods, or if there be no such lord of the manor, then the person having possession of the same, shall be at liberty to retain the same in his own custody, giving bond with two sufficient sureties, to be approved by the proper officer of the customs, in treble the value of such goods, for the payment of the duties thereon at the end of one year and one day, or to deliver such goods to the proper officer of the customs in the same state and condition as the same were in at the time of taking possession thereof." The year and day here mentioned is the period after which, by the statute Westminster 1, 3 ed. 1, c. 4, goods become forfeited by non-claim; and it is clear, on comparing this proviso with the preceding parts of sect. 51, that goods are considered to be the subject of duty as "wreck" and "derelict," as well within as after the year and day. Stat. 52 G. 3, c. 159, sects. 1, 2, 3, contained enactments like those of stat. 3 & 4 W. 4, c. 52, sects. 50, 51, and subject to the same observation. Stat. 1 & 2 G. 4, c. 75, s. 29, which is in *pari materia*, speaks of "wreck of the sea or goods" "cast on shore," and of the "owners" of such goods. By the last proviso of stat. 3 & 4 W. 4, c. 52, s. 50, if the wrecked goods will not sell for the full amount of duty, the lord of the manor, or other person entitled to receive the same, may have them, at a reduced duty, as unenumerated goods. If this section is limited to goods which have become strictly wreck by forfeiture, the lord, or other person, is relieved, but an owner, if he appears, cannot have the benefit of the proviso.

Secondly, if the right duty has been tendered, and improperly refused, the action lies against this defendant. Stat. 3 & 4 W. 4, c. 52, s. 18, directs that the person entering any goods inwards shall deliver to the collector or controller a bill of entry as there described, and duplicates thereof, and shall pay the duties; and it enacts that "such bill being duly signed by the collector and controller, and transmitted to the landing waiter, shall be the warrant to him for the landing or delivering of such goods." The defendant bore the office of collector, which is thus recognised by the act, and its duties, in the case now in question, specified. The fact of his being employed "by the order and with the concurrence" of the commissioners of customs, and removable by them,^(a) cannot affect his liability under these circumstances. He had not, indeed, the custody of the goods; but, without his signature to the bill of entry, they could not be obtained from the party having them in custody, nor trover brought for them if withheld; and that signature it was his duty to give. In *Rex v. The Commissioners of Customs*, 5 A. & E. 380, an owner of wrecked goods, in a case like the present, had tendered to the custom-house officers what he alleged to be the proper amount of duty, which they refused: a mandamus was applied for, requiring the commissioners of customs to deliver up the goods; and it was alleged that they were guilty of a nonfeasance as public officers in not delivering, or not giving an order for that purpose to the officer having the actual custody. The court held that a mandamus to the commissioners did not lie; and it may be collected from the judgments of Lord DENMAN, C. J., and PATTERSON, J., that they thought the proper remedy was by action against the officers. The commissioners could not be sued here, because the collector is noticed by the statute as filling a distinct office, the duties of which have been violated. *Schinotti v. Bumsted*, 6 T. R. 646, shows that an action lies against a ministerial officer for neglect of duty; and the defendant is such an officer.^(b)

^(a) See stat. 3 & 4 W. 4, c. 51, s. 6.

^(b) *Channell* also mentioned an unreported case of *Benningfield v. Stratford*, tried at

T. F. Ellis, contra. First, assuming that the proper duty was tendered, an action does not lie against this defendant; and, indeed, the question being virtually between the owner of these goods and the Crown, the proper remedy for the plaintiff would be, not an action against an officer, but a petition of right. It is a general rule of law that no person, simply as a servant of the Crown, is liable to an action for non-performance of duty; *Gidley v. Lord Palmerston*, 3 Brod. & B. 275: and it has been so decided even in cases (there cited by DALLAS, C. J.) where the defendant was sued on an express contract; *Macbeath v. Haldimand*, 1 T. R. 172, *Unwin v. Wolseley*, 1 T. R. 674. Where, indeed, a positive duty is expressly imposed by statute, an action lies; but the defendant, in such a case, is liable, not as a servant of the Crown, but as an individual disobeying the statute; and this explains the decision in *Schinotti v. Bumsted*. So in *Lacon v. Hooper*, 6 T. R. 224, the commissioners of customs were held liable in an action on the case for not making an order on the receiver-general for payment of a premium, which order they were required to make by stat. 26 G. 3, c. 50, and stat. 28 G. 3, c. 20. But, in these cases, the right of action can attach only on breach of a duty directly prescribed by the statute to the party sued. Now here it may be questioned whether the words of stat. 3 & 4 W. 4, c. 52, s. 18, "and such bill being duly signed by the collector and controller, and transmitted to the landing waiter, shall be the warrant to him for the landing or delivering," &c., do constitute a direct order to sign. But, if they do, the question remains, whether such order creates any liability in a person merely appointed to be the commissioners of customs to act as their servant. Stat. 3 & 4 W. 4, c. 51, s. 2, empowers the King from time to time to appoint, under the great seal, "any number of persons not exceeding thirteen to be commissioners of his Majesty's customs for the collection and for the management of the customs in and throughout the whole of the United Kingdom;" each commissioner to hold the office during his majesty's pleasure. The commissioners, therefore, are the collectors, by themselves or those whom they employ, and are answerable in law for any misfeasance in that office; a mere servant or deputy cannot be so. If an individual, bound to repair a fence, tells his servant to do it, and the servant will not, the master is still the party to be sued for such omission. The servant owes no duty to the party suing, but to his master only. [COLERIDGE, J. Could a commissioner properly sign the entry under stat. 3 & 4 W. 4, c. 52, s. 18?] He could; for the preceding act, sect. 2, makes the parties appointed under it commissioners for the 'collection' of the customs. And the action was against the commissioners in *Lacon v. Hooper*. [COLERIDGE, J. The bill of entry is to

Nisi Prius before Richards, C. B., in 1821, where an importer of tobacco sued the collector of excise for the port of London for refusing to accept the proper excise duty, payable under stat. 29 G. 3, c. 68, on tobacco of the plaintiff then in warehouse, and to sign a certificate according to sect. 52 of that act, to enable plaintiff to obtain delivery of such tobacco. A verdict was there taken for the defendant on some counts, and for the plaintiff on others (one of which stated the breach of duty as above), with 379*l.* damages, subject to a question of law on the liability. No opinion was given by the Lord Chief Baron, and Sir R. Gifford, Attorney-General, acquiesced in the verdict being taken, with a reservation of the point of law, which, however, was not afterwards brought before the Court. The case being again referred to on the present argument, Lord Denman, C. J., said that it amounted to nothing, no opinion having been given by the Judge at *Nisi Prius*, and no motion made in court.

be signed by the collector "and controller." A commissioner would sign as collector. The law laid down by HOLT, C. J., in *Lane v. Cotton*, 12 Mod. 472,(a) as to the liability of a servant, was not there disputed, though the rest of the Court differed from him on the principal point in the case; and his dictum on the subject is still cited as authority, as in 15 Vin. Abr. 316, *Master and Servant*, (G.), pl. 4. He says: "A servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrong-doer, or rescuer; and it will lie against any other that will rescue in like manner." In *Howell v. Batt*, 5 B. & Ad. 504, which was an action against the keeper of a coach-office for not transmitting to the plaintiff moneys received on his behalf at the office, it appeared that the defendant had acted as servant to a third party; and it was scarcely disputed that, on this part of the case, the defendant was exempt from liability, there being no privity between him and the plaintiff. The question, whether the statute imposes any duty on the defendant in this case, may be tried by three tests. 1. If the statute expressly ordered what the plaintiff has required, a mandamus would lie, though the defendant was the servant of the crown; this may be collected from the judgment of COLERIDGE, J., in *In re Baron de Bode*, 6 Dowl. P. C. 776.(b) But a mandamus does not lie in such a case to the commissioners of customs, because they are the servants of the crown; *Rex v. The Commissioners of Customs*, 5 A. & E. 380: this is the reason given by LITLEDALE, J.; the other grounds of decision, suggested on the Bench in the same case, seem shaken by *Rex v. Payn*, 6 A. & E. 392. 2. Suppose the defendant had instructions from the commissioners (the collectors under stat. 3 & 4 W. 4, c. 51, s. 2) to receive a particular rate of duty, could he have acted as a principal so far as to take a less sum in conformity with what he deemed to be the requisition of the statute? If not, he is not the person on whom the statutory duty lies. 3. If a petition of right were exhibited, the crown could not answer that the goods had not been delivered because the collector had refused to sign. The reply would be, "he is not an independent functionary, and the crown ought to take care that the servant employed does his duty."

Secondly, the tobacco in question does not come within the description, in stat. 3 & 4 W. 4, c. 52, s. 50, of "foreign goods, derelict, jetsam, flotsam, and wreck." In *Termes de la Ley*, tit. *Wreck*, (ed. 1671,) it is said that "Wreck" "is, where a ship is perished on the sea, and no man escapes alive out of it, and the ship or part of it so perished, or the goods of the ship, come to the land of any lord, the lord shall have that as a wreck of the sea. But if a man, or a dog, or a cat, escape alive, so that the party to whom the goods belong come within a year and a day, and prove the goods to be his, he shall have them again, by provision of the statute of Westm. 1, cap. 4," &c. Here the questions of wreck and of forfeiture are treated as identical. To constitute

(a) See p. 488.

(b) See p. 792.

wreck, and to create forfeiture, the non-appearance of an owner is essential. In *Termes de la Ley*, tit. *Jetsam*, it is said that "Jetsam is, when a ship is in danger to be cast away, and to disburthen the ship the mariners cast the goods into the sea: and although afterwards the ship perish, none of those goods called jetsam, flotsam, or lagan, are called wreck, as long as they remain in or upon the sea; but if any of them are driven to land by the sea, there they shall be reputed wreck, and pass by the grant of wreck." Such a grant clearly would not pass goods coming on shore under the circumstances described in this case. Bracton says, in Lib. 3, c. 3, s. 5, f. 120 a (cited, 2 Inst. 166:) "Magis propriè dici poterit wreckum, si navis frangatur, et de qua nullus vivus evaserit, et maximè si dominus rerum submersus fuerit, et quicquid inde ad terram venerit erit domini regis," &c. "Et quod hujusmodi dici debeant wreckum verum est, nisi ita sit quod verus dominus aliunde veniens, per certa juditia (a) et signa, docuerit res esse suas, ut si canis vivus inveniatur," &c. "Et eodem modo, si certa signa apposita fuerint mercibus et aliis rebus." And again, Lib. 1, c. 12, s. 10, f. 8 a (cited, 2 Inst. 167:) "Item tempore dicuntur res in nullius bonis esse, ut thesaurus. Item ubi non apparet dominus rei, sicut est de wrecco maris." Lord Coke says, in 2 Inst. 167, "The cause wherefore originally wreck was given to the crown, stood upon two main maxims of the common law; first, that the property of all goods whatsoever must be in some person. Secondly, that such goods, as no subject can claim any property in, do belong to the king by his prerogative, as treasure trove, strays, wreck of the sea, and others; because of ancient time, when the art of navigation was not so perfect, nor trade of merchandise grown to such perfection, as now it is, it was a matter of great difficulty to be proved, in whom the property of goods wrecked at sea was." This reasoning cannot apply where an owner is forthcoming. In *Hamilton v. Davis*, 5 Burr. 2732, where it was decided that goods cast away in a storm, recently followed, and identified by the owner, were not wreck, though no live animal came to shore, the terms "wreck" and "forfeited as wreck" were treated as convertible, both at the bar and by the Court. It was, indeed, decided, in *The Bailiffs, &c., of Dunwich v. Sterry*, 1 B. & Ad. 831, that goods might, for some purposes, be treated as wreck before the year and day expired, and although, at the end of that period, no forfeiture might attach. But that shows only that, before the owner appears, a special property in the goods may be vested in another. It is not the less true that, when the owner does appear, the goods are not wreck, and are shown never to have been so. It was argued at the bar, in that case, that "wreck" had two meanings; but the proposition was not made out. The words of Lord HALE, (*De Jure Maris*, p. 39, Part. 1, c. 7,) there cited: "if goods are cast upon the shore," (not "wrecked,") "they may be seized by the king, or the lord that hath the liberty of wreck, and lawfully detained, till the right owner come and claim them," show distinctly that goods cast on shore, where the owner is known, are not wreck; otherwise the proposition would be a truism. The subject is explained consistently with the argument now urged for the defendant, by PARKE, J., in delivering the judgment of the Court. He says (p. 843,) "If indeed the owner, or his servants or mariners, continue in the possession of the goods to which the misfortune of shipwreck has occurred, such goods

(a) Sic, in ed. 1559. "Indicia" in 2 Inst. 166, ed. 1797.

are not in any sense "wreck;" for they are not "bona vacantia," and therefore do not belong to the crown or its grantee by virtue of its prerogative." And (p. 845,) he states the opinion of the Court to be, in the case before them, "that the plaintiff had a special property in, and consequent right of action for the taking of, the cask in question: and that it was wreck within the meaning of that term in the law, so as to entitle the grantee to seize it; though it was not "wreck," so as to become finally his absolute property, in which sense that word is used in some of the text writers, and in the statute of Westminster the First." That decision is consistent with the principle for which the defendant here contends; for, though there is a property up to the time of the owner's appearance, yet the claim by the owner divests that property, not merely from the time of the claim, but ab initio. If the grantee of wreck had assigned the goods before claim made, the assignee could not hold them afterwards. As PARKE, J., says, in an earlier passage, (p. 844,) "if no one is in possession of the goods, the crown or its grantee has a right to the custody; a possessory right, liable to be defeated" (not "transferred") "by the appearance of the true proprietor, and due proof of his title by any mode by which it can be satisfactorily established."

The custom-house acts prior to that in question show that the legislature has understood the term "wreck" in the sense here contended for by the defendant. Stat. 5 G. 1, c. 11, s. 13, provides for the payment of duties on goods which "shall be salvaged out of any ship or vessel that shall happen to be forced on shore or stranded upon the coasts of this kingdom (*not being wrecked goods*, or jetsam, flotsam, or lagan.)" What goods would those be, which, although stranded, were not wreck? The language must have reference to the criterion, whether or not the goods are so circumstanced as to become forfeit to the lord. Stat. 6 G. 4, c. 107, s. 47, empowers "the owner or salvor of any property liable to the payment of duty saved from sea," and in respect of which salvage shall have been awarded under any law at the time in force, or" "paid, or agreed to be paid by the owner thereof or his agent," to the salvors for salvage, to sell so much of the property saved as will defray the salvage awarded or sum paid or agreed to be paid; and that, on proof as there pointed out, the commissioners of customs may allow the sale of such property, free from all duties, to the amount of the sum awarded, paid or agreed to be paid, or such other sum as they shall think reasonable. That clause would comprehend wreck, if the argument for the plaintiff be correct; but that it does not do so is clear from sect. 48, where an inconsistent provision is made for goods "derelict, jetsam, flotsam, and wreck;" and the distinction contemplated in these two sections can depend only upon the circumstance of the owner being known or not. This is manifest from the whole of the latter section, and particularly from the concluding proviso, "that any lord of the manor having by law just claim to such liquors or tobacco, or if there be no such lord of the manor, then the person having possession of the same, shall be at liberty to retain the same in his own custody, giving bond, with two sufficient sureties, to be approved by the proper officer of the customs, in treble the value of such goods, for the payment of the duties thereon at the end of one year and one day, or to deliver such goods to the proper officer of the customs in the same state and condition as the same were in at the time of taking possession thereof." Neither here, nor in

the rest of the section, is any reference made to an owner; and the mention of the lord of manor, and possessor, and of a year and a day, shows that the legislature had in contemplation what is strictly and technically called wreck. Stat. 3 & 4 W. 4, c. 52, s. 49, is in the same words as stat. 6 G. 4, c. 107, s. 47; then follow sect. 50,^(a) on which the present case mainly turns, and other clauses, all inconsistent with the supposition of any person appearing as owner of the goods mentioned in those enactments. Thus, by sect. 50, in case of a question as to the "origin of the goods," (which could not arise where an owner was found,) they are to be deemed of the growth, produce, or manufacture of such country or place as the commissioners shall determine; and, by the same section, a mode of fixing allowances for damage is established, differing from that prescribed by sects. 30, 31, 32, where an importer appears. By sect. 51,^(b) the person having "possession of any such goods" as are mentioned in the preceding section is subjected to a penalty if he shall not give notice to the proper officer of the customs within twenty-four hours after such possession, or shall not pay the duties thereon, or deliver the same to the proper officer; but the owner, by stat. 3 & 4 W. 4, c. 56, s. 8, might "warehouse such goods upon the first entry thereof," "without payment of duty upon such first entry." Again, sect. 51, of stat. 3 & 4 W. 4, c. 52, contains a proviso^(c) that any lord of the manor having claim to such goods, or, if there be no lord, the person having possession of the same, may retain them in his custody, giving bond for payment of the duties at the end of a year and a day, or to deliver them to the proper officer, &c. But where an owner appears, he, as the importer, may warehouse the goods, under stat. 3 & 4 W. 4, c. 56, s. 8, and need not clear them for three years; stat. 3 & 4 W. 4, c. 57, s. 14. Stat. 1 & 2 G. 4, c. 75, cited on the other side, is not in *pari materia* with stat. 3 & 4 W. 4, c. 52, except on some few incidental points. Sect. 29, which was relied upon as connecting the term "wreck" with a provision in favour of owners, provides for the two distinct cases of stranding and wreck; the owners are evidently mentioned only in connection with the former. The main object of the legislature in stat. 3 & 4 W. 4, c. 52, s. 50, was, to define the duty upon goods not intentionally imported, and of too small value to be followed; and not to provide for the alleviation of duty chargeable upon owners in case of damage; an object already secured by sects. 30, 31, 32; the last of which, it may be observed, disallows any abatement in the case of tobacco.

Lastly, the tobacco in question was not "goods" "brought or coming^(d) into the united kingdom," within the meaning of stat. 3 & 4 W. 4, c. 52, s. 50. It had, according to the case, been imported and warehoused, and then duly entered for exportation to Antwerp, according to stat. 3 & 4 W. 4, c. 57, s. 42. The owner cannot now allege, in contradiction to his own bond, that the goods were coming and being brought into this kingdom when they were taken up as the case describes.

Channell, in reply. The cases cited for the defendant, in which a public servant has been held not liable to an action, were cases of contract, where the defendant had interfered as a known agent, and not as pledging his own credit. But in actions of tort a servant is liable; and

(a) Ante, p. 648.

(b) See p. 654, ante.

(c) Ante, p. 655.

(d) As to the construction of these words, see *Sheppard v. Gosnold*, Vaugh. 169, 165, 166.

Schinotti v. Bumsted, 6 T. R. 646, and *Lacon v. Hooper*, 6 T. R. 224, are instances of this in the case of public servants. According to the argument for the defendant there would be no remedy in this case; for a mandamus would not lie to the commissioners of customs,^(a) and if they were sued it might be said that they acted under the control of the lords of the treasury.^(b) There must, however, be some mode in which public officers shall be made amenable to the general laws of the country. Then as to the term "wreck." No doubt it includes property of which no owner appears within a year and a day; but it has also the more extensive signification relied upon by the plaintiff. PARKE, J., when delivering the judgment of the Court in *The Bailiffs, &c., of Dunwich v. Sterry*, 1 B. & Ad. 831, took notice of the passage in 2 Inst. 166, 167, but yet held that the lord might have a property in goods wrecked, where they did not remain unclaimed for a year and a day. The right, it is true, was initiatory only; but it was founded on their being "wreck." The decision in *Hamilton v. Davis*, 5 Burr. 2732, contains nothing to show that goods, although followed and identified by an owner, may not, for some purposes, be wreck. As to the custom-house acts: stat. 5 G. 1, c. 11, s. 13, cited for the defendant, does not speak of goods forced on shore or stranded, but of goods salvaged out of any ship that shall be so. The argument for the defendant on stat. 6 G. 4, c. 107, s. 47, is, that the goods there mentioned as "saved from sea" are not considered by the legislature as wreck, because of the distinct provision as to duties on wreck, in sect. 48; but, from the passing of stat. 52 G. 3, c. 159, downwards, there were always enactments in force which would apply to wrecked goods, independently of stat. 6 G. 4, c. 107, s. 48. The mention of a year and a day, in sect. 48, and other clauses, does not exclude the supposition of there being an owner, but, on the contrary, suggests that such owner may come forward. The provision in stat. 3 & 4 W. 4, c. 52, s. 50, for deciding on the origin of the goods, may not be quite consistent with this supposition, nor perhaps is it to be expected that every particular enactment should be so; it is sufficient if some are irreconcilable with any construction but that relied upon by the plaintiff. But the difficulties raised on this section, and on sect. 51, are obviated by assuming that they include both the case in which there is, and the case in which there is not, an owner found. It is argued that the abatement of duty in case of damage is provided for by sects. 30 and 31; but they apply only to the case of damage during a voyage which has been completed, and the goods voluntarily landed. Stat. 1 & 2 G. 4, c. 75, is, in the particular section which has been referred to, sect. 29, a statute in *pari materia* with 3 & 4 W. 4, c. 52, s. 50. As to the last point made for the defendant, the plaintiff insists only that these were not imported goods, but property warehoused and entered for exportation, and afterwards "coming into the United Kingdom" as "wreck" within the meaning of stat. 3 & 4 W. 4, c. 52, s. 50. This is borne out by the statement of the case; and therefore the lower duty attached, and was rightly tendered. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 22d,) delivered the judgment of the Court.

Two points were made in this case. The first in importance and order was, whether, assuming that the plaintiff had tendered the proper

(a) *Rez v. The Commissioners of Customs*, 5 A. & E. 380, (31 E. C. L. R.)

(b) Stat. 3 & 4 W. 4, c. 51, s. 3.

amount of duty, any action could be maintained against the defendant for refusing to accept it and sign a bill of entry, whereby the plaintiff was prevented from obtaining the delivery of the tobacco in question and selling it to advantage. And we are of opinion that such action is maintainable, although no malice or ill motive is imputed to the defendant. The case states him to be the collector of customs at Liverpool, employed as such by the order of the commissioners, and "that his duty was to collect the proper amount of duty on each article for which an entry was tendered, and, upon such duty being paid, to sign a bill of entry acknowledging the receipt, which then became a warrant for the delivery of such article from the charge of the proper officers." By stat. 3 & 4 W. 4, c. 51, s. 2, her Majesty is authorized to appoint commissioners for the collection and management of the customs. By sect. 6, the treasury, or these commissioners under the authority of the treasury, may appoint proper persons to execute the duties of the several offices necessary to the due management and collection of the customs, and all matters connected therewith, under the control and direction of the commissioners; and, by sect. 7, every person employed on any duty or service relating to the customs, by the orders or with the concurrence of the commissioners, shall be deemed to be the officer of the customs for that duty or service.

Taking the statement in the case and these clauses together, the defendant appears to be not merely the agent and servant of the commissioners, but to be himself a substantive and immediate officer of the crown; and he is charged with the execution of a certain limited duty.

It is true that, in the performance of that duty, he is subject to the control of the commissioners; but it is still his own duty, not theirs, that he is to perform; the acts which he does are his own acts, not theirs; their control is not an arbitrary one, but limited by the provisions of the statute wherever they apply, and does not absolve him from responsibility to persons affected by the due performance or neglect of his duties.

The nature of those duties is next to be considered; and, as regards the present question, they are plainly and merely ministerial. He is, according to the statement, to collect the proper amount of duty, and sign the bill of entry. This is not the less a ministerial duty because, in some instances, as in the present, it may not be clear upon the face of the statute what the proper amount of duty may be. Difficulties both of law and fact arise repeatedly to ministerial functionaries, such as the sheriff, in the discharge of his duties; but these do not alter their nature.

The defendant, then, is a public ministerial officer, and, being so, he is responsible for neglect of his duty to any individual who sustains damage by such neglect. *Schinotti v. Bumsted*, 6 T. R. 646, is a strong authority to this effect, the facts in that case respecting the commissioners of the lottery tending much more to raise a doubt whether the defendants had not a judicial discretion intrusted to them; and in *Lacon v. Hooper*, 6 T. R. 224, which was an action against the commissioners of customs for not making a certain order for the payment of money to which the plaintiffs claimed to be entitled under an act for the encouragement of the South Sea whale fishery, it was not questioned but that even they would be liable to the action, if the neglect of duty were made out.

We pass on, therefore, to the second question, whether, under the circumstances stated in the case, the tobacco in question is to be considered wreck within the fiftieth section of stat. 3 & 4 W. 4, c. 52. It is conceded by the plaintiff that, if the word "wreck" in that clause be confined to that only which would pass to the crown or the crown's grantee under the prerogative or franchise of wreck, these goods do not fall within that predicament; but it is contended by him that the word is not to be construed in so limited a sense; and we are of opinion that, according to established rules of construction, it ought not to be so construed. The section, in its enacting part, professes to extend to all "foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom;" and, without reference to their condition or value, subjects them to the same duties as imported goods of the same kind. If the section had stopped here, it would have been difficult to say that these goods were *imported* goods, for they were in the act of *exportation*: the owners had done nothing except with a view to exportation. Against their will, by the violence of the storm, they were separated from the vessel in which they were placed, and from the charge of those to whose custody they were intrusted, and either cast on shore, or, being found floating, carried thither: if imported, by whom could they have been said to be imported? But, if not imported, were they liable to *no* duty? Would it not then have been reasonably urged that they fell within the very words and intent of the enactment, and became subject, *as wreck*, to the same duty as if they had been imported?

If so, we must necessarily apply the same rule of construction to the proviso at the end of the section to *relieve* them, as we should have done to the enacting part to charge them. The word "wreck," no doubt, in both parts comprehends goods which strictly and technically speaking are "wreck;" but, as it is capable also of a larger sense, and as in both parts the object of the section can only be fully obtained by giving it that larger sense, we ought so to understand it. We are additionally led to this by considering that the term of contrast to the word "wreck" is not goods forfeited, or goods whereof the owner is known, but goods imported, as if the distinction present to the minds of those who framed it was, not between goods subject and goods not subject to a franchise, but between goods arriving in the regular course of importation and those coming by the casualties of the seas and storms; and accordingly, by the proviso, they are to be delivered over to the lord of the manor, or (using the most general words) "other person entitled to receive the same."

Upon both grounds, therefore, we think the plaintiff entitled to maintain the action and to our judgment according to the terms provided in the special case.

Judgment for the plaintiff.

HOLMES against CLIFTON, Esquire.—p. 673.

Where the sheriff on a *f. fa.* returns that he has levied part of the debt, and that the debtor has no goods whereof the residue can be levied; and the creditor accepts the amount levied on account, and towards payment of his debt; he is not thereby precluded from bringing an action against the sheriff for a false return.

CASE against the sheriff of Lancashire, for not levying under a *fi. fa.*, duly endorsed with a direction to levy of the goods of L. M. 110*l.* for debt, and 4*l.* for costs; and falsely returning that he had levied 160*l.* and retained 6*l.* 10*s.* for poundage and expenses, and had the residue, 153*l.* 10*s.*, ready to render to plaintiff in part satisfaction of his debt &c.; and that the said L. M. had no more goods in his bailiwick, whereof the rest of the debt could be levied.

Plea, that defendant levied 160*l.* of the goods of L. M., and retained 6*l.* 10*s.* for poundage and expenses, as stated in the return; and that, afterwards, and before action brought, plaintiff accepted and received the said residue, 153*l.* 10*s.*, and the same was then paid to plaintiff, for and on account, and in and towards payment and satisfaction of the debt and damages in the writ mentioned; and the plaintiff then and thereby waived and relinquished all cause and right of action against defendant. Verification.

Replication, that the plaintiff accepted and received the said sum, and the same was paid to plaintiff for and on account, and towards payment and satisfaction of the said debt and damages; but not in payment or satisfaction of the said debt and damages, in manner and form, &c. Conclusion to the country.

Demurrer, for that the plaintiff did not, in his replication, traverse or put in issue any material allegation in the plea; but only raised an immaterial issue, and confessed so much of the plea as was necessary to bar the action, without avoiding it. Joinder.

Knowles, for the defendant, relied upon *Beynon v. Garrat*, 1 C. & P. 154, (11 E. C. L. R. 351,) as exactly in point, and as deciding that, by taking the money out of Court, the plaintiff affirmed the return of the sheriff, and thereby estopped himself from maintaining an action for a false return; and he cited *Watson v. Wace*, 5 B. & C. 153, (12 E. C. L. R. 77,) as illustrating the same principle.

Bramwell, *contra*, was not heard.

PER CURIAM. (a) The case of *Beynon v. Garrat*, if correctly reported, cannot be maintained. It might as well be argued that a creditor, who accepts part of his debt, is precluded from recovering the rest.

S.

Judgment for the plaintiff.

(a) Lord Denman, C. J., Patteson and Williams, J^s. Little Dale, J., was absent.

KING against BRADDON.—p. 675.

To an action by endorsee against acceptor of a bill of exchange, payable three months after date, it is no defence (since 3 & 4 W. 4 c. 98, s. 7, and 7 W. 4, and 1 Vict. c. 90) that defendant being indebted to plaintiff on an account stated, it was agreed between plaintiff, drawer, and defendant, that plaintiff should forbear payment of the debt for three months; that defendant should pay to plaintiff a certain sum larger than interest at 5 per cent. per annum for such forbearance; that the bill should be made, accepted, and endorsed to plaintiff as a security for payment of the debt at the end of three months; and that the said sum was in fact paid by defendant, and the bill made, accepted, and endorsed to plaintiff, in pursuance of such agreement.

ASSUMPSIT by first endorsee, against acceptor of a bill of exchange for payment of 106*l.* 1*s.* 6*d.*, three months after date thereof, (20th June, 1838.)

Plea, that, before making the bill, defendant was indebted to plaintiff in 120*l.* 16*s.* on an account stated; and that it was corruptly agreed by and between plaintiff, defendant, and the drawer, that defendant should pay to plaintiff the sum of 14*l.* 14*s.* 6*d.*, in reduction of the debt; and that plaintiff should forbear and give day of payment of the residue, viz. 106*l.* 1*s.* 6*d.*, to defendant for the space of three months; and that, for such forbearance, defendant should pay to plaintiff 5*l.* 5*s.* 6*d.*, and the said bill should be made, accepted, and endorsed to plaintiff as a security for payment of the said residue at the end of three months. Averment of payment to plaintiff of the several sums of 14*l.* 14*s.* 6*d.*, and 5*l.* 5*s.* 6*d.*, in pursuance of the corrupt agreement; and of the making, acceptance, endorsement, and receipt of the bill by the plaintiff as such security as aforesaid, in further pursuance, &c.; and that the sum of 5*l.* 5*s.* 6*d.*, so paid, exceeded the rate of 5 per cent. &c.; by means whereof, and by force of the statute, the bill was wholly void. Verification.

Demurrer, (assigning special causes of demurrer not noticed in the argument.) Joinder.

R. V. Richards for the plaintiff. The plea is no defence since the stats. of 3 & 4 W. 4, c. 98, s. 7, and 7 W. 4, & 1 Vict. c. 80. (a) They provide in general terms that the liability of a party to any bill of exchange shall not be affected by reason of any statute or law in force for the prevention of usury. The case is clear of the question made in *Vallance v. Siddel*, 6 A. & E. 932, (33 E. C. L. R. 249.)

Busby, contra. The plea is good. That an instrument, made for the purpose of giving effect to a corrupt bargain, was void before the late statutes, is clear from *Roberts v. Trenayne*, Cro. Jac. 507, and *Morse v. Wilson*, 4 T. R. 353. The only question is, whether the bill is protected by those statutes. The word "such" must be supplied between the words "any" and "bill" in both statutes. The intention of the legislature sufficiently appears from the insertion of that word before the word "bill," in the latter part of the clause in both acts. Indeed the second act was not necessary, if the first had the effect of repealing stat. 12 Ann. st. 2, c. 16. Then are the last acts applicable to a case

(a) The words of 3 & 4 W. 4, c. 98, s. 7, are, "No bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury, nor shall any person or persons drawing, accepting, endorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalties or forfeiture; any thing in any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding."

The above provision is extended by 7 W. 4, & 1 Vict. c. 80, which enacts "That from and after the passing of this act, and till January 1st, 1840, no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive, or allow interest in discounting, negotiating or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, endorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; any thing in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding."

where the usury is not confined to the bill itself, but affects the very transaction in which the bill originated, and which it was intended to cover? In *Berrington v. Collis*, 5 New Ca. 332, (35 E. C. L. R. 128,) the Court in giving judgment say, that the acts contemplate the case of interest taken on, or secured by, a bill "as the real and bonâ fide ground of the debt;" and do not extend "to the case of a bill of exchange, or promissory note, given in addition to a security of another nature not protected by the statute, upon which the debt was really contracted." Here there was a previous debt found due upon an account stated, upon which usurious interest was agreed to be paid. The bill itself did not bear illegal interest, but was given to secure the performance of this previous bargain, which is not itself made legal by any act. If a bill or note given for such a purpose be valid, it will be easy to elude the laws against usury in every case.

R. V. Richards, in reply. The word "such" may be inserted in this part of the section without injury to the plaintiff's demand; for the bill is payable at three, or within twelve months after date, and therefore protected by either statute. In *Berrington v. Collis*, the loan was really on security of a lease and a warrant of attorney, and the application was to set aside judgment entered up on the latter. If the loan had been on the security of the note alone, the decision would have been different; *Connop v. Meaks*, 2 A. & E. 326, (29 E. C. L. R. 107.)

LORD DENMAN, C. J. We cannot take the case out of the protection of the statutes. The bill is made payable at three months after the date, or has not more than three months to run. This is all that the stat. 3 & 4 W. 4, c. 98, s. 7, requires to exempt it from the operation of the usury laws.

PATTESON (a) and WILLIAMS, Js., concurred.

S.

Judgment for the plaintiff. (b)

(a) Littledale J., was absent.

(b) See *Holt v. Miers*, 5 M. & W. 168; and stat. 2 & 3 Vict. c. 37, continued by 3 & 4 Vict. c. 88.

The QUEEN against The Inhabitants of BLACK CALLERTON.—p. 679.

On appeal against an order of removal, it is a good objection, that the copy of examination, sent to the appellants under stat. 4 & 5 W. 4, c. 76, s. 79, does not show that the pauper was chargeable.

ON appeal against an order of justices removing Hannah Hope, widow, and her two children, from the township of Quarrington, in the county of Durham, to the township of Black Callerton, in the county of Northumberland, the sessions confirmed the order, subject to the opinion of this Court upon a special case.

The case stated an agreement by which Andrew Hope, afterwards the husband of the pauper Hannah, was hired to work in a colliery, and under which he served for the stipulated period, residing in Black Callerton. After some details as to the service under this contract, the case proceeded as follows.

The said Andrew Hope subsequently married and died; and, on 10th February, 1838, an order in the usual form was made (stating the above

order of removal). A notice in writing of chargeability, and a copy of the order of removal, were served upon the overseer of Black Callerton, and likewise copies of the examinations taken before the removing justices; but such examinations did not contain any statement or proof that the said pauper and her children were then chargeable to, or had been relieved by, the township of Quarrington. The township of Black Callerton appealed against the order, and stated in their notice two grounds of appeal. 1. That Andrew Hope never gained a settlement in the appelland parish by hiring and service: and, 2. That it did not appear, by the copy sent to them of the examinations taken at the time of making the said order, that the pauper and her said children were at the time of making such order chargeable to the township of Quarrington. At the hearing, after the original examinations, and the copies sent to the appelland township, had been put in, the second ground of appeal was insisted upon by the counsel for the appellants as a preliminary objection to the respondents' going into evidence in support of the order of removal, but was overruled; and the court of quarter sessions proceeded to hear the respondents' case.

The questions for the opinion of this Court were, 1. Whether, as it did not appear by the copies of the examinations that the pauper and her children, at the time of making the order of removal, were chargeable to the respondent township, the respondents could be heard in support of such order? 2. Whether Andrew Hope gained a settlement in Black Callerton by such hiring and service as aforesaid?(a) If this Court should decide both questions in the affirmative, the orders were to be confirmed; otherwise quashed.

Ingham and *Hedley*, in support of the order of sessions. As to the preliminary objection, stat. 4 & 5 W. 4, c. 76, s. 79, enacts that no pauper be removed by reason of his being chargeable to, or relieved in, any parish, till after "a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent," as there directed. That does not require that the chargeability shall appear by the examination; the notice gives information of that fact, and would be superfluous if the examination were necessary to show it. The material facts in an examination are those which concern the settlement, and so bear upon the grounds of removal. The complaint of chargeability, and the examination with a view to removal, are different proceedings: the one may be heard by a single justice, without oath; the other is taken on oath, by two justices. It would be hard that the respondents should suffer by the neglect of those taking the examination to advert to a particular fact. It was the opinion of this Court, in *Rex v. Kelvedon*, 5 A. & E. 687, that an examination may be treated with less strictness than a notice of appeal, because the respondents, in an examination, do not use their own language. They cannot control the proceeding of the magistrates. No one could have been misled here; and that argument, in favour of an examination, was used by Lord DENMAN, C. J., in *Regina v. Church Knowle*, 7 A. & E. 471. (The arguments as to the hiring are omitted.)

Cresswell and *Granger*, contra, were stopped by the Court.

Lord DENMAN, C. J. The preliminary objection is not to be got over.

(a) The objection was, that the contract of hiring was exceptive.

If we do not require that the chargeability shall appear on the examination, we shall give occasion to speculative removals.

PATTESON, J.(a). It is argued that the statute requires only three things to be sent before the pauper is removable; notice of chargeability; a copy or counterpart of the order; and a copy of the examination upon which the order was made; and that proof of chargeability is not required to be sent. But the word "examination," though in the singular number, means all the evidence,(b) and must necessarily include the proof of chargeability, without which the order could not be made.

WILLIAMS, J. Proof of chargeability is the foundation of the order of removal. It must therefore appear in the examination sent to the appellant parish. Orders quashed.(c)

(a) Littledale, J., was absent.

(b) See *Regina v. Outwell*, 9 A. & E. 836.

(c) See the next five cases.

The following cases may properly be added here.

The QUEEN against The Justices for the Eastern Division of SUSSEX.
Jan. 16.—p. 682.

A notice of appeal, under stat. 4 & 5 W. 4, c. 76, s. 81, alleging, as the ground, a settlement in another parish, T., is bad if it merely states that the pauper, in or about 1830, paid parochial taxes for a tenement in the parish of T. rented by him, at 15*l.* a year, for the term of one year, and occupied by him under such hiring for one year, the rent, to the amount of 10*l.*, being paid by him; and that the pauper rented (the aforesaid tenement (not describing it further), at 15*l.* a year, and occupied under that hiring for one year, and paid 10*l.* rent. The premises should be further described, by giving, at any rate, the landlord's surname.

HENRY GILBERT was removed by an order of two justices from the parish of St. Thomas the Apostle, in the town of Winchelsea and county of Sussex, to the parish of Carshalton in Surrey. The parish officers of Carshalton gave notice of appeal, stating, as the grounds: First, that H. G. did not acquire a settlement in Carshalton by service, &c. (as stated in the examination): Secondly, that, subsequently to his leaving the service, &c., "he, the said H. G., acquired a settlement in the parish of Ticehurst, in the aforesaid county of Sussex, by having, in or about the year 1830, paid parochial taxes for and in respect of a certain tenement in the aforesaid parish of Ticehurst, rented by the said H. G., at the sum of 15*l.* a year, for the term of one whole year, and occupied by him under such hiring for more than the said term of one year; the rent for the same, to the amount of 10*l.*, having been paid by the said H. G.:" Thirdly, by having rented the aforesaid tenement in the said parish of Ticehurst at the sum of 15*l.* a year, and having occupied the same under such hiring for more than the term of one year, and having paid rent to the amount of 10*l.* for the same tenement." The appeal was called on for hearing at the Lewes quarter sessions, April, 1839, when the respondents' counsel objected to its being heard, because the grounds were not sufficiently set forth in the notice, inasmuch as the appellants had neglected to mention therein the name of the person or landlord of whom H. G. hired and rented the premises

alluded to in the second ground of appeal; and inasmuch as such notice did not otherwise sufficiently describe and fix dates or times when such premises were so rented or occupied by the pauper. On the first objection, the omission of the landlord's name, the sessions refused to hear the appeal, and confirmed the order of removal. In Trinity term, 1839, a rule nisi was obtained for a mandamus to the justices to enter continuances and hear the appeal.

Tyndale now showed cause. The notice ought at least to have stated the landlord's name; or, if not, the situation of the house, or some other particular from which the respondents could ascertain the facts material to their case; *Rez v. The Justices of Derbyshire*, 6 A. & E. 885.

Petersdorff, contra, was called upon by the Court. The two facts stated, that the pauper rented a tenement in the parish, and paid parochial taxes for it, are sufficient for the purpose suggested. The respondents, being furnished with these, might obtain the necessary information from the parish officers. [Lord DENMAN, C. J. The pauper's name might appear on the rate books in respect of different tenements. The notice ought to have shown distinctly what settlement the appellants meant to prove. They must have known; why should not they tell the opposite party?] Too great particularity would be inconvenient, because a slight variance might defeat the appeal. [Lord DENMAN, C. J. Is there any inconvenience in showing the local situation?] That might be difficult in a country parish. Giving the name of the landlord would not secure the information required: changes might have occurred, by death or otherwise. [Lord DENMAN, C. J. The subject of inquiry would be, of whom the pauper hired.] The payment of parochial taxes affords guidance enough for any necessary inquiry.

Lord DENMAN, C. J. I do not mean to say that the local situation of premises must necessarily be specified, because that may be difficult; though in a large parish it ought to be ascertained as nearly as possible. But at any rate the landlord's name should be given. This notice was insufficient.

LITTLEDALE, J. The landlord ought to have been described; I do not say by his Christian name, but at any rate by his surname.

COLERIDGE, J.(a) Ascertaining the situation of the premises might be more or less difficult, according to the nature of the parish. In an agricultural parish, for instance, there might be a good deal of difficulty; but, there, naming the landlord would be the best way of fixing the property.

Rule discharged.(b)

(a) Williams, J., was on the special commission at Monmouth.

(b) See the next case.

The QUEEN against The Justices of the West Riding of YORKSHIRE.—p. 685.

(CLINT against BIRSTWITH.)

Where the pauper's examination differs from his evidence at sessions, as to any circumstance making a part of the matter pointed to in the statement of grounds of appeal, it is for the sessions to decide whether the variance be material within stat. 4 & 5 W. 4, c. 76, s. 81.

So held on application for a mandamus to enter continuances and hear an appeal.

Per Lord Denman, C. J. The examination of the pauper is to be construed as strictly as the statement of grounds of appeal.

At the Summer sessions for the West Riding of Yorkshire, 1839, an appeal came on to be heard against an order removing John Lax, his wife and children, from the township of Birstwith to the township of Clint, both in the West Riding. The alleged settlement in Clint was by occupation of a tenement there. On the evidence of the pauper at sessions, it appeared that he entered on the occupation of the tenement a year later than the year stated in that behalf in his examination before the justices. Upon this the Court stopped the hearing and discharged the order. *Cresswell*, in Michaelmas term, 1839, obtained a rule nisi for a mandamus to the justices of the West Riding to enter continuances and hear the appeal. By the affidavit in answer, it appeared that Lax, in his examination before the justices, stated that he entered upon the occupation in June, 1827, as tenant to a Mr. Fawcett, and gave up possession in June, 1828; and that the grounds of appeal were stated to be, that he "did not bona fide rent or occupy, for the term of one whole year, a farm in the township of Clint, from the beginning of June, 1827, until the latter end of June, 1828, as tenant to," &c.

E. Perry (with whom was *Baines*) now showed cause. There are two questions: first, whether the sessions have decided rightly; secondly, if not, whether the Court will interfere. *Ex parte Broseley*, 7 A. & E. 423, is an authority on both points. (He was then stopped by the Court.)

Merivale, contra. As to the first point, sect. 81 of stat. 4 & 5 W. 4, c. 76, certainly uses the same language as to the examination of the pauper and the statement of grounds of objection; but it is reasonable that a more liberal interpretation should be adopted in the former case than in the latter. The appellant parish states its own objections; but the pauper is not the agent of the removing parish, nor under their control. A mere slip of memory, or a clerical error of the party taking down the examination, will, if this application fail, be sufficient to prevent the merits of the settlement from being determined. The only reasons for strictness as to variances must be that they tend to mislead, or affect the merits. Here the variance could not mislead; which takes the case out of the principle upon which, if at all, *Ex parte Broseley* must be supported. And the only question on the merits is, whether the pauper occupied a tenement so as to gain a settlement: not whether he occupied it in one year or another. In *Rex v. Kelvedon*, 5 A. & E. 687, (a) COLERIDGE, J., appears to have thought that a mere statement of the fact of settlement in the appellant parish would suffice, and the Court seem to have considered that the examination was to be interpreted less strictly than the grounds of appeal. If the rule is to be

(a) See pp. 690, 691.

strict, a variance of one day would be fatal; but that cannot be held. Then, as to the second point, the Court will inquire whether the sessions have rightly decided a matter preliminary to their inquiry into the merits; and the decision of the sessions here has no relation to the merits. *Rex v. Frieston*, 5 B. & Ad. 597, *Rex v. The Justices of Cumberland*, 4 A. & E. 695, are in point. In the latter case, the sessions had commenced the inquiry into the merits; but decided ultimately on a preliminary point.

Lord DENMAN, C. J. I think that we are not precluded from entering into an inquiry whether the sessions have decided rightly upon any preliminary point of practice necessary to determine their own jurisdiction. In this case, however, the decision is on a question which may often raise great difficulties either at the sessions or here. Mr. *Merivale* contends that a different degree of strictness must be applied to the pauper's examination and the statement of objections. I cannot accede to that. Each party gets the facts from the pauper. When the case comes to sessions, a variance may occur, so trifling that it could not possibly mislead. Other variances, again, though they may appear like mere clerical errors, may be of the utmost importance, as, for instance, a wrong year, or a wrong name in a populous parish. The sessions, therefore, must exercise their judgment. They can best decide whether the variance is such as to mislead; and thus it is quite within their jurisdiction to decide whether there is, or is not, a substantial variance. When there is any difference whatever between the examination and the evidence, this Court cannot take it upon themselves to say that the sessions have decided wrong. Such an interference would lead to inquiries into minute particulars, which we cannot institute.

LITLEDALE, PATTESON, and COLERIDGE, Js., concurred.

Rule discharged.(a)

(a) See the next case.

The QUEEN against The Inhabitants of MIDDLETON in TEES-DALE.—p. 688.

A copy of examination furnished, under stat. 4 & 5 W. 4, c. 76, s. 79, on removal of a pauper, does not give sufficient information of the settlement relied upon, if it merely state that the party gained a settlement by renting and occupying a tenement of J. T. (naming the landlord) in the township, &c., (to which the pauper is removed) of the yearly rent of 10*l.*; no time being specified.

And, on appeal, the appellants may take advantage of such defect, though their notice of grounds of appeal state only that the order of removal, examination, and notice of chargeability, are bad upon the faces thereof.

On appeal against an order of justices, removing Elizabeth Collinson from the township of Newbiggin, in the county of Durham, to the township of Middleton in Teesdale, in the same county, the sessions confirmed the order, subject to the opinion of this Court upon a case, the material parts of which were as follows.

The removal was made upon the examination of the pauper alone, which stated "that she is nineteen years of age, and that her father gained a settlement in the township of Middleton in Teesdale, in the said county, by renting and occupying a house and land of one Jacob

Tarn, in the said township of Middleton in Teesdale, of the yearly rent of 10*l.*" (The rest of the examination related to the pauper herself, and is not material.) Copies of the examination, order of removal, and notice of chargeability, were duly served. Notice of appeal and the grounds of appeal were also duly served. The grounds of appeal were stated as follows: 1. "That the order, the examination upon which the same is grounded, as also the notice of chargeability accompanying the same, are bad upon the faces thereof." 2. "That the lawful settlement of the said Elizabeth Collinson" "is not in our township of Middleton in Teesdale, as represented in the said order, but, on the contrary, is in your township of Newbiggin (she not having gained a settlement in her own right), her father having gained a settlement there by renting a tenement of the value of 10*l.* or more, in the years 1816, 1817, 1818, and 1819, or some or one of them, and resided there during the time." 3. "That the said Matthew Collinson" (the father) "also gained a settlement in your said township of Newbiggin, by again renting a tenement therein in the years 1829, 1830, and 1831, or some or one of them, and paid rent for the same to the amount of 10*l.* for the year." On the hearing of the appeal, the respondents insisted that the settlement of the pauper, as set forth in her examination, was admitted by the appellants, as their notice did not, in the first ground, specify any defect in the examination, and was therefore inoperative; and did not, in the second or third ground, deny the settlement alleged in the examination; and that the appellants ought not to be allowed to give evidence of the settlement stated in either the second or third ground of their appeal, as the allegation was defective in not sufficiently describing the tenement, there not being any statement either of the nature of the tenement, or of whom it was held. The sessions, being of this opinion, confirmed the order of removal, subject to the opinion of the Court of Queen's Bench. If this Court should be of opinion, either that the respondents ought to have proved their case by evidence, or that the appellants ought to have been admitted to contest the validity of the order, examination, and notice of chargeability, or to give evidence of the settlement alleged in the second or third ground of their appeal, the appeal was to be reheard. If this Court should, on both points, be of the contrary opinion, the order of sessions to be confirmed.

Ingham, in support of the order of sessions. The appellants could not avail themselves of the alleged settlement of Matthew Collinson, because it is too vaguely stated in the notice of appeal; *Rex v. The Justices of the Eastern Division of Sussex*, ante, p. 682. (*Wilkinson*, contra, admitted this.) Then the first ground of appeal is insufficient, being also too vague to apprise the respondents of the answer relied upon by the appellants. Objections, even on the face of the order of removal, must be pointed out by the notice of appeal; *Rex v. Withernwick*, 6 A. & E. 273; which is supported in principle, by *Regina v. Hockworthy*, 7 A. & E. 492.(a) [Lord DENMAN, C. J. The objection here is, that the justices have removed the pauper, no settlement in the appellant parish appearing.] That objection is not specified. It would be very dangerous to admit such a general form of notice. A clerical error, of 1*l.* for 10*l.*, might be meant. Respondents should have such information as will enable them to take advice whether they shall maintain or abandon their order. Parish officers cannot be expected to

(a) See p. 496.

know every defect on the face of an order or examination which might be taken advantage of on such a notice as this. Not only is the notice here too vague, but it tends to mislead, for it seems to point out some objection common to the order, examination, and notice of chargeability.

Wilkinson, contra, was stopped by the Court.

LORD DENMAN, C. J. The appellants say that this examination is bad on its face; and the question is whether it be so, not formally, but for want of any ground for the jurisdiction of the justices. I think it is bad on that account. The examination does not show a renting by the pauper's father for any specified time. The respondents, on notice of appeal, should have given their attention to this, and seen whether they could remedy the error. I think that *Rex v. Withernwick* accords with our present decision. All that was there held was, that appellants cannot take objections not noticed in their statement of grounds of appeal, though apparent on the face of the order. It is argued that the defects alluded to by the present objection may be such as are not essential. But the difficulty is the absence of statement in the examination; on looking at it, we cannot give the respondents credit for more than is set out; and no jurisdiction appears.

LITTLEDALE, J., concurred.

PATTESON, J. It may appear very strict, but it is best to hold parties to the requisition of the statute. There must be an examination showing what the settlement is. Here the removing magistrates have been satisfied with a statement by the pauper "that her father gained a settlement in the township of Middleton in Teesdale" "by renting and occupying a house and land of one Jacob Tarn in the said township," "of the yearly rent of 10*l.*," without ascertaining how long or when he so rented. They might as well have been satisfied with a mere statement that he was settled in the township.

WILLIAMS, J., concurred.

Appeal to be reheard.(a)

(a) See the next case.

The two following cases were decided in Hilary term, 1841.

The QUEEN against The Inhabitants of BRIDGEWATER.—p. 693.

In a notice of appeal under stat. 4 & 5 W. 4, c. 76, s. 81, against an order of removal, alleging, as the ground of appeal, a settlement by hiring and service, the general rule is, that the date of the service, as well as the master's name, should be stated; and that a notice omitting such date is bad. If it appear that the appellants could not ascertain it, *semble*, per Lord Denman, C. J., and Littledale, J., that the strict rule may be dispensed with.

Per Lord Denman, C. J., and Coleridge, J.; the sessions may judge whether, under the circumstances of any particular case, time is so material that the omission to specify it vitiates an examination or notice of appeal.

On appeal against an order of justices, removing Henry Channon and his family from the parish of Bridgewater to the parish of Compton Bishop, both in the county of Somerset, the sessions quashed the order, subject to the opinion of this Court on a special case, in substance as follows.

The appeal came on to be heard at the Wells Lent sessions, 1840.

Notice of appeal had been given, stating, as the grounds, "That the said Henry Channon, the father, has never been maintained by our said parish of Compton Bishop, but that the said Henry Channon, the father, has resided in and obtained a settlement in your said parish of Bridgewater by servitude therein, the said Henry Channon, the father, having been the hired servant of Charles Knight, of Bridgewater aforesaid, sheriff's officer, for a period exceeding one year, and has not, since such servitude, obtained a settlement in our said parish; and that the said Henry Channon, the father, was, by such service as aforesaid, and now is, legally settled in the said parish of Bridgewater."

On the trial of the appeal, the respondents objected that the notice was insufficient, "for not stating the time of the service of the pauper with Charles Knight." The Court were of opinion that the objection was valid, but proceeded to try the case upon the merits, and decided that the pauper gained a settlement in Bridgewater by hiring and service for fifteen months in 1825 and 1826; and the order was quashed, subject to the opinion of this Court as to the sufficiency of the notice of appeal on the above point. If the Court should be of opinion that the grounds of appeal were sufficiently stated, according to stat. 4 & 5 W. 4, c. 76, s. 81, the order of removal to be quashed; otherwise to be confirmed.

Cockburn and *T. W. Saunders*, in support of the order of sessions. The whole objection to this notice is, that the date of the service is not stated. But, if a notice states the cause of appeal, it is not necessary to set forth all the circumstances of the appellants' case. *Rex v. The Justices of Derbyshire*, 6 A. & E. 885, may be cited on the other side; but there the observation of *LITTLEDALE, J.*, in delivering judgment was, that "without being informed of the time of service or the name of the master, the respondents would in vain make inquiries in any populous parish as to the fact of the pauper having been hired and served in it." Here "the name of the master" is stated. The only object of stat. 4 & 5 W. 4, c. 76, s. 81, is, that the respondents may have such information as may enable them to contest the appeal on the merits; here that is furnished: it was not so in *Rex v. The Justices of Derbyshire*, or in *Regina v. The Justices of The Eastern Division of Sussex*, ante, p. 682, where the notice was held insufficient. It appears to be now settled that the same rule of strictness applies to a notice of appeal and to an examination furnished under sect. 79; but an examination which stated a hiring and service to A. B. would be circumstantial enough, though it did not give a date. An aged person might not be able to fix the period of the service; yet, if the justices believed his statement, they would be bound to act upon his examination. The notice, by sect. 81, is to state the grounds of appeal; the time of service is no essential part of the grounds. [*COLERIDGE, J.* The same may be said of the place, and so that might be omitted.] The place might be material, for the purpose of showing that it was not extra-parochial. [*COLERIDGE, J.* Time might be equally material; as for the purpose of showing that the pauper was unmarried when hired. The object of notice is to give some available information to the respondents. Suppose, in stating the place, you merely mentioned *Newton*, which is the name of many places in England.] If the time or place were a material circumstance, it ought to be stated particularly; but that is not so in every case. The degree of minuteness necessary will vary with circumstances: in one parish

more will be requisite, in another less; and of this the sessions must judge, as was held in *Regina v. The Justices of the West Riding*, (*Cint v. Birstwith*,) ante, p. 685. No general proposition can be laid down on the subject. [COLERIDGE, J. If that be so, have not the sessions here given judgment against you?] They resolved this point as a question of law, without reference to the particular facts. If they have acted erroneously, the Court will, at most, only send the case back to them, not quash their order.

Kinglake, contra. In *Regina v. The Justices of the West Riding*, Lord DENMAN, C. J., said that there was no difference, as to strictness in the construction, between an examination and a statement of grounds of appeal. [Lord DENMAN, C. J. That was not a special case, but an application for a mandamus; and we thought that the sessions were bound to exercise their own judgment as to the sufficiency of the matter stated. I think that, in every case, each party is bound to tell the other all he knows. The knowledge may be different on one side and the other. The respondent discloses his case by the examinations; then comes the appellant and states his ground of objection; if in doing so he fails to specify time, the question arises whether time is material in the case.] In *Regina v. Middleton in Teesdale*, ante, p. 688, an examination showing a settlement by renting a tenement was held defective, because it specified no time, though the landlord's name was mentioned. [COLERIDGE, J. There the time might be material on account of the several statutes altering the law as to this head of settlement.] It would be equally material here, because stat. 4 & 5 W. 4, c. 76, s. 64, enacts that "from and after the passing of this act no settlement shall be acquired by hiring and service, or by residence under the same." [He was then stopped by the Court.]

Lord DENMAN, C. J. I think that it is necessary, in a notice of this kind, to state the time as far as the parties know it. They may not know it, and that case may require to be considered differently from others. But it would be very dangerous if it were held generally sufficient to give a notice as vague as that the party served John Smith, in Marylebone.

LITLEDALE, J. This case, like *Rex v. The Justices of Derbyshire*, 6 A. & E. 885, is not free from difficulty; but the time, in a notice like this, is almost as essential as the name. The service may have taken place thirty years ago; and the supposed master may have left the place or be dead: but, if the date is fixed, the respondents may perhaps be enabled to show that the pauper was not in the place, or that he was in some other place, at the time in question. There may be an inconvenience in requiring these particulars; but on the whole I think it is best that both time and name should be given. In some cases it may be impossible; but that may be a reason for dispensing with the strict rule in the particular case.

PATTESON, J. I think both statements should be given. Where they are withheld, I suspect it is generally an intentional omission.

COLERIDGE, J. It is against all the authorities to say that a mere statement of the legal ground of appeal, without the circumstances, is sufficient. We must construe sect. 81 with reference to the proviso which limits the evidence, on the hearing of an appeal, to those "grounds of removal, or of appeal," which shall have been "set forth in such respective order, examination, or statement as aforesaid." This seems to show

an intention that the kind of case relied upon should be stated, so as to give the opposite party a power of meeting it on the merits. I doubted at first whether the information here furnished was not sufficient: but, if we are to lay down a general rule, I should say that there ought to be strict good faith, and full information given: and, as the omission to fix a time would often leave the opposite party no means of meeting the case, that the statement should specify time. Still I think that in many cases the sessions would do well to constitute themselves judges of the requisite particularity, and if they thought that, in the instance before them, information enough had been given, decide the point of law accordingly. Order of sessions quashed.

(a) See the next case.

Also, as to the particularity requisite in a notice of grounds of appeal, *Regina v. Whitley Upper*, 11 A. & E. 90.

The QUEEN against The Inhabitants of ALTERNUN.—p. 699.

The copy of examinations transmitted with an order of removal, under stat. 4 & 5 W. 4, c. 76, s. 79, must show, on the face of it, every fact necessary to give the justices jurisdiction to remove.

Where the examination shows all such particulars, and discloses no irregularity, it cannot be objected, on appeal, that the evidence was in fact inadmissible, if the objection was not made known to the justices at the examination.

Where an order of removal had been made upon the examination, regular on the face of it, of T. B., which was transmitted according to stat. 4 & 5 W. 4, c. 76, s. 79, and, on appeal, the appellants offered to prove that T. B., when examined, was a convicted felon:

Held, that such evidence was irrelevant if offered as impeaching the examination.

ON appeal against an order of two justices removing Catharine Bray, Charles Bray, &c., from the parish of Gwennap in the county of Cornwall, to the parish of Alternun in the same county, the sessions confirmed the order, subject to the opinion of this Court upon a case, in substance as follows.

Catharine Bray, Charles Bray, &c., children of Thomas Bray, were removed as above stated. The order of removal was dated on January 2d, 1840, and the notice of chargeability on the 8th of that month. Besides the examination which related to the chargeability, the only examination which accompanied the order, and related to the settlement, was the examination of Thomas Bray, the father, which was dated January 1st, 1840, and who was described in the examination as a prisoner in the gaol at Bodmin. Eight grounds of appeal were then set forth in the case, as having been stated by the appellants in their notice of appeal. The first three controverted the acquiring of a settlement in Alternun, as alleged by the respondents; the fourth and fifth set up later settlements elsewhere; the sixth turned upon a want of certainty in the examination of Bray as to the ages of the children; the seventh alleged a want of certainty in the same examination as to the time and manner of acquiring a settlement in Alternun. The eighth, the only one material to the present decision, was as follows.

“Because the said examination of the said Thomas Bray, on which the said order was made, is insufficient, illegal, and without effect, and ought not to have been taken by the said justices, he, the said Thomas Bray, at the time of the taking thereof, being a convicted felon in the

said gaol at Bodmin in the said county of Cornwall, and now suffering his punishment there."

At the hearing of the appeal, the appellants called upon the respondents, according to the practice of that Court of Quarter Sessions,^(a) to support their order; upon which the respondents objected that the appellants had not sufficiently stated their grounds of appeal and objection to the settlement, by apprenticeship in the appellant parish, disclosed in the examination of the pauper. This objection was argued by the advocates on both sides; and the sessions decided that the notice of the grounds of appeal was insufficient for this purpose. The appellants then, in support of their last ground of appeal, tendered in evidence a record purporting to be a record of the conviction of the said Thomas Bray for felony at the quarter sessions for Cornwall, held on 31st December, 1839. The sessions refused to receive this evidence; and the order was confirmed. No evidence was offered on the other grounds of appeal. The respondents did not seek to read the said examination as evidence on the hearing of the appeal.

If the sessions were right in rejecting such evidence, the order of removal and order of sessions were to be confirmed; otherwise the order of sessions to be quashed, and the appeal reheard.

Sir *W. W. Follett* and *M. Smith*, in support of the order of sessions. The objection relied upon is not, on any ground, relevant to the inquiry before the sessions. The question there was, whether the pauper was settled and the order good: it could not be material to the decision on those points, whether the magistrates acted rightly or not in taking the examination. The only provision as to examinations, in stat. 4 & 5 W. 4, c. 76, is sect. 79; and that lays down no rule as to the manner in which they shall be taken, or the consequences of taking them improperly. [*COLERIDGE, J.*—Suppose the examination had appeared not to be upon oath.] That is not the present case. It does not appear that the magistrates taking the examinations knew that Bray was a convicted felon. [*PATTESON, J.*—The examination is not placed on the footing of evidence by the statute. If, indeed, the convict were offered as a witness at the sessions, an objection would arise, which is not raised here.] The examination is to be used, not as evidence, but as a piece of pleading to inform the opposite party what grounds of removal are insisted upon. The witnesses examined by the magistrates need not be called at the sessions. If Bray had been called at the sessions, it would have been time enough then to take any objection to his competency. The two examining justices are not to hunt out records of conviction. [*COLERIDGE, J.*—Suppose it had appeared that the whole evidence had been hearsay.] It is not clear that that would have been an objection. Hearsay evidence is constantly admitted in these examinations, though it would not be received at the sessions: great expense would be occasioned by excluding it on the preliminary investigation. The argument for the appellants would establish that every examination, upon evidence not good in all points, would be a nullity, and the order made upon it unavailing.

Bere, contra. If this objection fail, the decision in *Regina v. Middleton in Teesdale*, ante, p. 688, must be overruled. There the order of magistrates was held not maintainable, because no jurisdiction appeared by the examination, and the respondents could not go beyond it

(a) The Bodmin sessions for Cornwall

in their case at sessions. [Lord DENMAN, C. J. I do not feel pressed by that case. But the practical difficulty here is, whether the argument is to be carried so far as to hold the order bad if any improper evidence whatever, as hearsay, has been received by the examining justices; for any such piece of evidence may have influenced them in making the order.] If the whole evidence was of that character, the order would be invalid. So, in *Rex v. Luffe*, 8 East, 193, where a bastard was filiated by a married woman, if the non-access of the husband had been proved by the wife alone, the order would clearly have been held bad. Suppose that the two justices have removed without any examination, or without any complaint by parish officers, and that fact appears; surely the appellants may object that the very ground of jurisdiction is wanting. If the examinations do not show that the pauper is chargeable, that objection may be taken on appeal; *Regina v. Black Callerton*, ante, p. 679. Before the act 4 & 5 W. 4, c. 76, it was decided that, if an order of removal appear to be grounded on an examination improperly taken, the objection is good on appeal; *Rex v. Coln St. Aldwin's*, Burr. S. C. 136. In the present case it is evident from the dates that Bray was a convicted felon at the time of the examination. In *Rex v. The Justices of Norfolk*, 5 B. & Ald. 484, an order of removal was abandoned, because liable to the same objection. [Lord DENMAN, C. J. I do not think that case has much bearing on the present. It turned principally on another point. And the order seems to have been abandoned because the parties could not have supported it at sessions.] Whether an order has been made without evidence, or on the evidence of a witness who is incompetent, the objection may be taken on the appeal.

Lord DENMAN, C. J. My impression at first was opposite to the opinion I now entertain. I think the two justices were bound to take the prisoner's examination, unless it was brought to their knowledge that he was a felon convict. Whether he actually was convicted when the examination was taken, we do not know, though he appears to have been so by relation of the time of conviction to the first day of the sessions. Our decision, that the justices were bound to take this examination unless they knew at the time that Bray was a felon convict is not at variance with the cases. In *Regina v. Black Callerton*, ante, p. 679, the fact of chargeability was omitted in the examinations. In *Regina v. Middleton in Teesdale*, ante, p. 688, the examination showed no settlement whatever; therefore there was an evident want of jurisdiction. Parties interested in the order have a right to call upon the justices to make everything which gives them jurisdiction appear on the examinations. Here they did so as far as they knew. The evidence stated was evidence which they were bound to receive: the objection to it would arise at the sessions, if there tendered. *Rex v. The Justices of Norfolk*, 5 B. & Ald. 484, shows how the case would stand in this respect. The justices appear to have had jurisdiction; their order shows chargeability and a settlement, and is made on evidence which they were obliged to receive as good, unless informed to the contrary. The orders must therefore be confirmed.

LITTLEDALE, J. Everything done by the justices was correct, if there was no objection to the testimony on which they acted; and it does not appear that they had any knowledge of the party having been convicted. They might, indeed, have inquired, but no inquiry took place. The

examination was perfect, as far as the proceeding went; the case is the same as if they had examined witnesses who afterwards turned out to be interested; and this would clearly be no objection to the examination.

PATTERSON, J. The appellants do not show in their notice of grounds of appeal, nor does it appear otherwise, that the two justices knew of this objection: therefore the examination is, on the face of it, good. It states that the party was a prisoner in Bodmin gaol; but he may have been merely committed for trial. *Regina v. Black Callerton* was a different case; for there a palpable omission appeared in the examinations; the pauper must have been chargeable, or the magistrates could not have had jurisdiction; evidence of that fact must have been received; and the whole evidence ought to have been set out.^(a) That was the ground of decision. The record of conviction here gives a date prior to that of the examination; but that may be by relation to the first day of the sessions. And, however this might be, I am not sure that the proceeding of the justices was wrong. The objection to this evidence applies only to the proceeding at sessions. The record of conviction would have been of use when the witness was produced there; but the attempt here is to make it bear upon the examination. Having never attended sessions, I do not know what the practice was formerly in cases of this kind, and whether, if respondents were prepared with good evidence on the hearing of an appeal, it could ever have been objected that the case was proved by improper evidence before the removing justices; but now, under stat. 4 & 5 W. 4, c. 76, the ground of removal is to appear by the examinations transmitted with the order: here it does so appear, and no objection to the examinations is shown.

COLERIDGE, J. I think the objection taken at sessions was not relevant. It is decided, now, that every thing requisite to make the removal valid must appear on the order and examinations; and that rule was complied with here. But, assuming that appellants may show at the sessions, not only that the examinations, on the face of them, do not justify the removal, but, even where that is not so, that the examination was in fact irregularly taken, nothing wrong appears in this case. The witness Bray was *prima facie* competent. The two justices went to him in the gaol; but it is not stated that they had any proof of his conviction. Then they were bound to examine him. The case is like that put by my brother LITTLEDALE, of an order made on the examination of witnesses who, by subsequent proof, are shown to have been interested. The incompetency so established is of no consequence as to the examination: the magistrates were bound to take it at the time; and their order was rightly made.

Orders confirmed.

^(a) *Regina v. Outwell*, 9 A. & E. 886.

The QUEEN against The Inhabitants of FLADBURY.—p. 706.

A case from the quarter sessions stated that, the justices being equally divided in opinion, the chairman gave a casting vote in favour of the order, which was confirmed accordingly; that on the following day the appellants' counsel protested against the legality of the decision; that "the question" was then argued on both sides, and that the justices then present "determined to adhere to" the former decision: Held, that although the proceeding on the first day was irregular, this Court would not assume that the decision on the second day was not a judgment upon the merits.

Pauper rented a cottage and premises, including a ferry with the use of a boat and line, across an adjoining river. The premises, without the ferry, were not worth 10*l.* a year. Held, that the ferry might be included in order to make up the necessary value: and that, supposing the boat and line to be distinct personal chattels, the Court would not presume that the value of the tenement would be insufficient without them, upon a case reserved which did not show such insufficiency.

ON appeal against an order for the removal of Louisa Berrington, from the parish of All Saints in the borough of Evesham in the county of Worcester, to the parish of Fladbury in the same county, the sessions confirmed the order, subject to the following case.

In 1811 the father of the pauper rented under a verbal agreement, and occupied for a year, a cottage, yard, and garden, for which he paid 10*l.*; but included in the taking was a right of ferry over the river Avon from the river bank of the premises in question to the opposite bank of the river in the parish of Cropthorne. The use of the ferry-boat and line was also included. The emoluments of the ferry were derived partly from sums paid in gross in lieu of tolls, and partly from specific tolls, which were paid sometimes on the Fladbury side, sometimes in the course of the transit, and sometimes on the Cropthorne side. The cottage, yard, and garden were not worth 10*l.* per annum alone; and it was contended by the appellants' counsel that, under the circumstances, "the value of the ferry, &c.," could not be called in aid to augment the value of the tenement in Fladbury. The sessions held otherwise. A difference of opinion arising on the bench, as to whether the premises, together with the ferry, were of 10*l.* value by the year, an equal number of magistrates, including the chairman, voted on each side; upon which the chairman, with the assent of all the magistrates, except one, gave a casting vote in favour of confirming the order, and it was confirmed accordingly. On the following morning the appellants' counsel, having discovered how the decision had been given, protested against its legality; "the question" was argued by counsel on both sides; and the magistrates then present, not being entirely the same as those who had so voted on the previous evening, "determined to adhere to the decision of the preceding day." If the Court should be of opinion that the decisions of the sessions were correct, then the order was to be confirmed; otherwise to be quashed.

Kelly and *Domville* in support of the order of sessions. However irregular the proceedings of the first day may have been, they were cured by a regular judgment of the majority on the following day; and the case distinctly states a decision of the Court which must be presumed to be regular. If the Court had adjourned till the next day by reason of the want of unanimity, they could only have done as they did, that is, put the question to the vote a second time.

Then as to the settlement, a franchise, such as a ferry, is, legally speaking, a tenement; 2 Black. Com. 17; but, whether it be or not, the emoluments of it may be added to the cottage and premises for the

purpose of making up the value; *Rex v. Bubwith*, 1 M. & S. 514. The boat and line are appurtenant to the ferry; but, if taken as mere personalty, they may also be added for the same purpose. Thus water or windmills, containing movable machinery which make up the value, will give a settlement; *Evelin v. Rentcombe*, 2 Salk. 536, *Rex v. Butley*, Bur. S. C. 107. At all events, as the value of the boat and line is not found in the case, this Court will not deduct it from the value of the premises and ferry, as there stated. Where furnished rooms were rented at 10*l.* a year, and nothing was found as to the value of the furniture, the renting was considered sufficient, in *Rex v. Whitechapel*, 2 Bott, 84, pl. 132, 6th ed.; and the same was held of a colliery let with its live stock, ropes, &c.; *Rex v. North Bedburn*, Cald. 452.

Whitmore contra. The judgment given on the first day was a nullity; the chairman had no casting vote, nor could the consent of others give it to him. The justices ought to have adjourned till there was a majority; 2 Nol. P. L. 546, 4th ed. This Court may direct them now to enter continuances for the purpose of hearing the appeal. The proceeding of the next day did not mend the defect. [Lord DENMAN, C. J. If the sessions had adjudged that the order of removal should stand, because the Court was equally divided, would not that have been sufficient?(a)] It would not, and, if it would, that is not what the sessions have done. They have grounded their decision on a majority illegally obtained. [Lord DENMAN, C. J. On the second day, the decision may have been on the merits.] The only point argued and determined on the second day was, the legality of the proceeding on the first. If they had merely pronounced a judgment without showing why or how they had decided, this Court would not have inquired further; but here they refer to the opinion of this Court the legality of the whole proceeding.

As to the settlement, the questions will be, 1. Is the ferry a tenement? 2. Had the pauper any legal interest in it? 3. Can it be included in the value? A ferry is a mere franchise, not lying in tenure: no interest in it, or in the tolls, can pass without a deed; and therefore, no settlement could be gained; *Rex v. Chipping Norton*, 5 East, 239, *Rex v. North Duffield*, 3 M. & S. 247. In *Rex v. Bubwith*, 1 M. & S. 514, the sufficiency of the demise was assumed. Without a deed, the verbal grant operated as a mere license. Then part of the grant was the mere use of personal chattels, namely, the boat and line, which cannot be considered in estimating the annual rent or value of the house and premises; 2 Nol. P. L. 34.

Lord DENMAN, C. J. The proceeding of the justices on the first day was no doubt irregular. But, on the next, the matter was again discussed, and we cannot presume that the judgment then pronounced was entirely independent of the merits. It does not appear to have proceeded solely on the ground that the first decision was regular. Then as to the settlement, it is found that the cottage and premises were not alone of sufficient value; but the enjoyment of the ferry and its tolls was included in the demise, and the whole together made up the required value. As to the boat and line, supposing them to be distinct from the ferry, the case does not find their value; nor show that, without them,

(a) See *Rex v. The Justices of Monmouthshire*, 4 B. & C. 844; *Rex v. The Same*, 8 B. & C. 137.

the tenement was worth less than 10*l.* per annum. *Rex v. White-chapel*, 2 Bott, 84, pl. 132, 6th ed., is therefore in point.

PATTESON(a) and WILLIAMS, Js., concurred.

S.

Order of sessions confirmed.

(b) Litledale, J., was absent.

The QUEEN against The Inhabitants of BRIDGEWATER.—p. 711.

Before the passing of stat. 5 & 6 W. 4, c. 76, (Municipal Corporation Act,) the borough of B. had a quarter sessions and four justices, but no non-intromittant clause. The parish of B. was wholly within the jurisdiction of the borough justices, though part only was within the borough; and both parish and borough were within the county of S. By the operation of that act, part only of the parish was included within the new boundary of the borough, and neither the recorder, nor the borough justices, had any jurisdiction over the rest of the parish. Since that act, there were separate quarter sessions and seven justices for the borough. The overseers of the parish made one poor-rate for the whole, which was duly allowed by justices, both of the county and borough. An inhabitant and occupier of land in the part out of the borough appealed against the rate, on the ground that certain inhabitants of the part within the borough were not rated in respect of stock in trade.

Held, that the county sessions had jurisdiction to try the appeal, and to amend the rate by inserting the stock in trade; for that the county justices had jurisdiction by virtue of 1 G. 4, c. 88, before the passing of stat. 5 & 6 W. 4, c. 76; and sect. 111 of the latter act excludes their jurisdiction only where the borough was before exempt from it.

ON appeal against a rate, made on the 6th October, 1838, for the relief of the poor of the parish of Bridgewater, in the county of Somerset, on the ground that certain inhabitants had not been rated in respect of stock in trade producing profit within the parish, the court of quarter sessions for the county of Somerset amended the rate by inserting the names of the parties so omitted, subject to the opinion of this Court on a case of which the following are the material facts.

The whole borough and parish of Bridgewater is within the county of Somerset. The borough has a recorder and quarter sessions under stat. 5 & 6 W. 4, c. 76, (Municipal Corporation Act.) Before the passing of that act, the borough had justices of its own, and a separate court of quarter session, but no non-intromittant clause in its charter. The ancient borough contained a part only of the parish; but the jurisdiction of the borough justices was co-extensive with the parish. The boundaries of the borough were altered by the above act. They now exclude some parts of the parish, and include parts of some adjoining parishes. The grant of a quarter sessions, by letters patent, is dated 10th June, 6 W. 4. It assigns the recorder to be the King's justice to inquire of and hear and determine all felonies, misdemeanours, crimes, and offences committed in the borough. Neither borough justices nor recorder have any jurisdiction beyond the new limits of the borough. Before the passing of the above act, the borough had only four justices; but at the time of this appeal there were seven, and the borough was divided into two wards. The appellant lives, and the whole of the land for which he is rated, is situate in that part of the parish which is without the limits of the borough. The persons, whose stock in trade has been omitted out of the rate, are inhabitants of that part of the parish which lies within the borough, and their stock is wholly within that part. The rate was allowed by two justices of the county, and three of the borough. The parts of the rate which apply to inhabitants within the

borough are distinct from those which apply to the inhabitants residing without the borough; but the whole is only one rate, and is signed and allowed once at the foot of the whole. One rate has been hitherto made for the whole parish, and it has been the practice to rate stock in trade and ships.

The questions for the opinion of the Court were,

1. Whether the county sessions had jurisdiction to try the appeal?

2. Whether the inhabitants were rateable in respect of stock in trade?

If the opinion of the Court on both questions should be in the affirmative, the order was to be confirmed. If the Court should be of opinion that the sessions had no jurisdiction to amend, but had jurisdiction to quash either the whole rate, or the parts applying to persons residing without the borough, and that stock is rateable, the rate was to be quashed accordingly. If the opinion of the Court should be that the sessions had no jurisdiction either to amend or quash, the rate was to be confirmed.

Bere and M. Smith, in support of the order of sessions. Since *Regina v. Lumsdaine*, ante, 157,(a) the question as to the rateability of stock in trade must be considered as settled. [This was conceded on the other side.] Then the only questions remaining are, as to the jurisdiction of the county sessions, or their power to amend the rate. It is clear that no appeal lay to the borough sessions, because the appellant resides, and is rated in respect of property, out of the borough. If, therefore, the county justices have no jurisdiction, the appellant has no remedy. The power of the county sessions must be ascertained by reference to the old statutes, as controlled or altered by the Municipal Corporation Act. Sect. 8 of 43 Eliz c. 2, gave to the head officers of corporations, being justices of the peace, the same powers within the limits of their jurisdictions as the county justices in the execution of that act, and prohibited other justices from intermeddling. As the whole parish was formerly within the liberty, and under the jurisdiction of the borough justices, this act operated as a sort of ne intrumittant clause; *Rex v. The Justices of Essex*, 5 M. & S. 513, 515:(b) and the county sessions had no jurisdiction to try an appeal against a rate for the parish. Then 17 G. 2, c. 38, s. 5, provided that, in corporations not having four justices, the party aggrieved by a rate might appeal to the county sessions. As there were four justices at Bridgewater, this statute made no alteration. Then stat. 1 G. 4, c. 36, gave the party the option of an appeal to the county sessions, in corporations not having more than six justices, nor jurisdiction over two or more parishes or wards. The effect of this was to give the county sessions jurisdiction over appeals from rates in this borough. Then is there anything in the Municipal Corporation Act, or in the charter, to take this jurisdiction away, which (*Blankley v. Winstanley*, 3 T. R. 279) can only be done by express words? By sect. 7 of the Municipal Corporation Act the boundary of Bridgewater is made to correspond with that established by 2 & 3 W. 4, c. 64, (Parliamentary Boundary Act;) and by sect. 8 the part of the parish, excluded from the new borough, is thrown into the county. This exclusion from the borough is still further confirmed

(a) But see the temporary act, 8 & 4 Vict. c. 89, which prohibits rating any inhabitant as such, in respect of his ability derived from the profits of stock in trade.

(b) Per Lord Ellenborough.

by stats. 6 & 7 W. 4, c. 103, and 1 Vict. c. 78, s. 30. The appellants are therefore more completely separated from the borough than he was before. Then sect. 111 of the Municipal Corporation Act provides that no part of a borough, for which a separate court of quarter sessions is holden, shall be within the jurisdiction of the justices of the county, *from which such borough was exempt before the passing of the act*. Bridgewater was not exempt before; therefore the county jurisdiction is not excluded since the act. The fact that there are now seven justices for the borough is not material; for stats. 17 G. 2, c. 38, and 1 G. 4, c. 36, evidently contemplate justices who can sit at a quarter sessions; whereas, under the new system, the recorder alone is the judge (sect. 105 of 5 & 6 W. 4, c. 76.) Nor is the recorder a "head officer" of a town, &c., within sect. 8 of stat. 43 Eliz. c. 2; for sect. 57 of the Municipal Corporation Act gives the mayor precedence. But, whatever be the effect of that act upon appeals by inhabitants within the borough, neither the recorder nor the justices of the borough have any power to try an appeal for a grievance without its limits. Sect. 9 of 43 Eliz. c. 2, provides for some cases where a parish lies partly within and partly without a liberty, but does not apply to this case. With respect to the power of amendment, stat. 41 G. 3, c. 23, s. 1, gives the power to insert or alter in any manner that shall be thought necessary for giving relief. The alteration therefore has been properly made, unless the Court shall be of opinion that no such power can be exercised over so much of the rate as concerns the part of the parish within the borough; in which case, if the rate be divisible, it must be quashed as to the part out of the borough.

Sir J. Campbell, Attorney-General, and Kinglake, contra. This is probably a casus omissus; and an appeal lies neither to the borough nor the county sessions, because the rate is entire for the whole parish, and neither has jurisdiction any longer over the whole. But it is enough at present to show that the county sessions has no jurisdiction. The persons and property omitted are both wholly within the borough. The negative words used in sect. 8 of stat. Eliz. exclude the county justices; *Rex v. St. Mary, Taunton*, 1 Bott, 265, *Rex v. Justices of Essex*, 5 M. & S. 513. The borough was therefore exempt within the meaning of sect. 111 of 5 & 6 W. 4, c. 76, although there happened to be only four justices within the borough at the time of passing the act. Then, by the Municipal Corporation Act, sect. 105, the recorder has cognisance of all matters cognisable by any quarter sessions, notwithstanding his being sole judge. The act 1 G. 4, c. 36, is therefore impliedly repealed by this provision; and the recorder now stands in the position of the justices of a corporation under sect. 8 of 43 Eliz. c. 2. Consequently the parish is divided between the two jurisdictions, and the entire rate is not within the cognisance of either. The borough sessions cannot examine the rate upon persons in the county; nor the county sessions intermeddle with the rate in the borough. To give the county sessions jurisdiction, the whole parish must be within the county. According to *Rex v. Butler*, 4 Burn's Justice, 161, tit. (D'Oyly & Williams's ed.), both sets of justices must concur in the allowance of the rate: and it would be an anomaly that the appeal against it should be only to one set. The rate cannot be divided between the two portions of the parish; *Rex v. Gordon*, 1 B. & Ald. 524; except where the legislature has legalized such a practice; stat. 59 G. 3, c. 95. The division of parishes between

two jurisdictions has presented difficulties in other cases which the legislature has been obliged to obviate; as in the case of county rates; stat. 1 & 2 G. 4, c. 85, s. 1. Section 9 of 43 Eliz. c. 2, provides for another similar case, but is inapplicable to this. In *Rex v. Weston*, 4 Burr. 2507, it was held that the inhabitants of the whole of a parish, situate in two counties, could not be indicted for the want of repair of a part lying in one county, but the inhabitants of that part only should be indicted. [PATTESON, J. That case is overruled by *Rex v. Clifton*, 5 T. R. 498.] The decision is overruled, but not the principle on which it is founded, viz., that neither county has jurisdiction over part of parish in the other. *Rex v. Clifton* decides only that *parishioners* may be indicted, though they live in another county; and that the question was not one of locality. Here the rate is entire, and cannot be divided between two jurisdictions. Suppose the parish lay in two counties; to which sessions must the appeal against a rate be?

LORD DENMAN, C. J. Looking at the acts of parliament in force on the passing of the Municipal Corporation Act, and at the state of the borough at that time, it appears that the county sessions then had jurisdiction to try appeals against a rate for the whole of this parish. By sect. 111 of that act, places, not then exempt from the county jurisdiction, continue subject to it. In this case there was no such exemption: therefore the county justices retain their jurisdiction. If there be any inconvenience in this, it must be remedied by the legislature.

PATTESON, J.(a) The decision of this case depends on the construction of sect. 111 of stat. 5 & 6 W. 4, c. 76. This parish was always within the liberties of the borough until that act; and by 43 Eliz. c. 2, the appeal lay to the borough officer or justices. The jurisdiction of the borough was untouched by stat. 17 G. 2, c. 38, because it had four justices. After stat. 1 G. 4, c. 36, an appeal lay to the county sessions. The effect of the Municipal Corporation Act, coupled with the Boundary Act, stat. 2 & 3 W. 4, c. 64, was to detach part of the parish from the borough, both as to locality and jurisdiction. Then stat. 5 & 6 W. 4, c. 76, s. 111, provides, first, for boroughs to which no separate court of quarter sessions shall have been granted; secondly, for boroughs in which such a court is holden; and, in the latter case, no part of the borough is to be within the jurisdiction of the county "from which such borough, before the passing of this act, was exempt." Now, if there had been more than six justices in the borough when the act passed, the operation of 43 Eliz. c. 2, s. 8, would have exempted it from the county jurisdiction, and then the point would have arisen which has been noticed in the argument; for the parish would then have been divided between two exclusive jurisdictions, neither of them having cognisance of the whole rate. But the present case is free from that difficulty; for the whole was within the jurisdiction of the county sessions, as to appeals against rates, before and at the passing of the act; and there is no reason why it should not remain so. The object of the act seems to have been to leave things, in this respect, exactly as it found them.

WILLIAMS, J., concurred.

S.

Rate confirmed, as amended by the sessions.

(a) Littledale, J., was at the Central Criminal Court.

RANDELL against WHEBLE.—p. 719.

Under stat. 2 W. 4, c. 39, (and see stat. 1 & 2 Vict. c. 110, s. 3, and sched. No. 1,) it was the duty of the sheriff executing a writ of *capias* to arrest on the first opportunity, and an action lay against him for default made before the return day of the writ, provided some actual damage had resulted to the plaintiff; not otherwise. In a declaration for such default, it was not a sufficient allegation of damage to state that defendant did not arrest, &c., and wilfully neglected opportunities of doing so, and that the debtor did not put in special bail according to the exigency of the writ, whereby plaintiff was delayed in the recovery of his debt, and is likely to lose the same. But an averment that the sheriff was in default after the writ was returnable would have implied legal damage.

Semble, that, on special demurrer, such declaration would have been bad for not averring that the sheriff had been in default more than eight days before the commencement of the suit; but that, on general demurrer, it was sufficient, if the count alleged that the debtor had not put in special bail according to the exigency of the writ.

The declaration ought to have stated that the writ was delivered to the sheriff within four calendar months from the issuing; but, *semble*, the omission of such statement was matter of special demurrer.

CASE. The declaration, of 30th May, 1837, stated that Richard Thomas, on, &c., was indebted to plaintiff in a large, &c., exceeding 20*l.*, viz. 50*l.*; that R. T. being so indebted, plaintiff, for the recovery, &c., viz., on 20th February, 1837, sued out of K. B. against the said R. T., a *capias* directed to the sheriff of Berkshire, bearing date, &c., viz. the day and year last aforesaid, commanding the sheriff that he should not omit, &c., but enter, &c., and take R. T. if he should be found in his bailiwick, and him safely keep until he should have given bail or made deposit, &c., in an action, &c., or should by other lawful means be discharged, &c. The rest of the writ was set out, in the form required by stat. 2 W. 4, c. 39, sched. No. 4, (a) and commanded the sheriff immediately after the execution thereof to return the writ to K. B., with the manner in which he should have executed the same, and the day of execution; and, if the same should remain unexecuted, then that he should return the same at the expiration of four calendar months from the date, or sooner if thereunto required by order of the said Court, or by any judge thereof. The count then stated the endorsement for bail for 147*l.*, and that the writ so endorsed, "afterwards, to wit, on the day and year first aforesaid, was delivered to the defendant, who then and from thence hitherto hath been and was, and still is, sheriff" of Berks, to be executed. Averment, that R. T., at the time of the delivery of the writ to defendant so being such sheriff as aforesaid, and from thence hitherto was within the said sheriff's bailiwick, and defendant, as such sheriff, at any time during that period, could and might and ought to have taken and arrested R. T. by virtue of the writ at the suit of plaintiff, if he would so have done, whereof the now defendant, during all that time had notice. and that, before the commencement of this suit, and after the delivery of the writ as aforesaid to defendant, so being and as such sheriff as aforesaid, to be executed, more than a reasonable time had elapsed for arresting and taking R. T. under and by virtue of the said writ. Yet defendant, not regarding the duty of his said office, but contriving, &c., hath not at any time, although often requested

(a) See 1 & 2 Vict. c. 110, s. 3, and Sched. No. 1. The body of the writ of *capias* there given, and the memorandum limiting the time of execution, are substantially the same as in the former statute, except that "one" month is substituted for "four."

so to do, taken or caused to be taken, the said R. T., as by the said writ he was commanded, but therein hath wholly failed and made default, and hath wilfully suffered and permitted divers convenient opportunities for arresting and taking the said R. T. under and by virtue of the said writ to escape and pass by; and R. T. did not cause special bail to be put in for him in the said action, in K. B., according to the exigency thereof, or otherwise observe the requisition of the said writ, but therein wholly failed, &c. Whereby plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same, and hath lost and been deprived of the means of recovering his costs and charges by him, &c., in and about his said suit against the said R. T., amounting together to a large, &c., viz. 100*l*. To the damage, &c.

Plea. That plaintiff ought not further to maintain, &c., because, before the expiration of four calendar months from the date of the said writ, and before defendant had been required to return the same by order of K. B., or by any judge thereof, or otherwise, viz., on 15th June, 1837, by an order of the same date, (the plea then stated an order made in the cause by COLERIDGE, J.) it was ordered, with the consent of the attorneys, &c., and the plaintiff, for valuable considerations, undertook, promised, and agreed with R. T., that the plaintiff should not execute or require the execution or return of the said writ, and plaintiff waived and dispensed with the execution and return, &c., and wholly discharged the defendant therefrom; whereby, and by means whereof, and the procurement of plaintiff, and according to the course and practice of the said Court, defendant was hindered, prevented, and discharged, thenceforth whilst the said writ was in force, from taking or causing to be taken the said R. T. as by the said writ he was commanded; and it from thenceforth became unnecessary and improper for the defendant or R. T. to cause special bail to be put in for R. T. in the said action, &c., according to the exigency thereof, or to otherwise observe the requisition of the said writ; and defendant and R. T. were, by the means and procurement of plaintiff, from thenceforth wholly hindered, prevented, and discharged from so doing as they might and otherwise would have done." Verification.

Replication. That, after the delivery of the writ, duly endorsed, &c., to wit, as in the declaration mentioned, to defendant to be executed, and before the said expiration of four calendar months from the date of the said writ, to wit, from the date of the said writ hitherto, R. T. was within the said sheriff's bailiwick, and defendant, as such sheriff, at all times during that period could and might have taken and arrested R. T. by virtue of the said writ at the suit of plaintiff, whereof defendant during all that time had notice as in the declaration mentioned. And that, defendant having wholly neglected and refused to take and arrest R. T. for a long and unreasonable time after he had such notice as last aforesaid, plaintiff commenced and prosecuted against defendant the present action and proceeded to declare therein against the now defendant for the cause in the declaration and in this plea aforesaid. And that no such order, undertaking, promise, or agreement, as in the last plea mentioned, ever was made until afterwards and long after the happening of all the matters above in this replication mentioned. Verification.

General demurrer and joinder. The ground of demurrer stated in the margin of the paper-book was, that the defendant had four calendar months in which to arrest R. T. unless ruled to return the writ previ-

ously, and therefore that, he being discharged from executing the writ before any return of it, no action would lie. The demurrer was argued in this vacation. (a)

Cowling for the defendant. There is no doubt that, if a good cause of action had accrued before the order of COLERIDGE, J., was made, that order did not divest it. The plea puts the Court in possession of all the facts, which show that, if the plaintiff here recovers, a sheriff may be rendered liable for negligence in not executing a writ which he has not been, and never can be, called upon to return. Since stat. 2 W. 4, c. 39, an action for not executing a writ of *capias* does not lie against the sheriff till the expiration of four calendar months from the date, or till he shall have been required, by order of the Court or a judge, to return the writ. Formerly, an omission, before the return day, to arrest, did not render the sheriff liable unless he had not only had an opportunity of arresting, but also failed in producing the defendant at the return day, or some special damage had arisen. The general law on the subject, before the statute, is stated by DE GREY, C. J., in *Hawkins v. Plomer*, 2 W. Bl. 1048: "In arrests upon mesne process, it is sufficient if the sheriff brings in the body on the day of the return; and therefore in *The Sheriff of Nottingham's Case*, Noy's Rep. 72, a distinction is taken, that in actions for escape on mesne process the writ shall surmise that *ad largum ire permisit, et non comparuit ad diem*: on process of execution *ad largum ire permisit* is sufficient. And so are the precedents." The sheriff's duty under the new act, 2 W. 4, c. 39, appears by the form of a *capias* in the schedule, No. 4, which shows that, if there has been no arrest or order, the expiration of four calendar months is the return day. The averment in the declaration, that bail was not put in according to the exigency of the writ, is unmeaning, or at any rate cannot imply that the four calendar months had elapsed; for the record shows the contrary. It may be contended that the words "omit not," &c., "but that you enter," &c., "and take C. D. of — if he shall be found in your bailiwick," mean that an absolute duty is imposed upon the sheriff of arresting in a reasonable time; but in *Brown v. Jarvis*, 1 M. & W. 704, (b) which may be cited for the plaintiff, Lord ABINGER, C. B., said that it was not contemplated, in framing this writ, to alter the sheriff's responsibility. And, before the statute, it was so far his duty to arrest at the first opportunity, that if he had not done so he might, on that ground, have been liable to an action after the return day, if the defendant had not then appeared. A liability would have attached before the return day, in the case of a neglect causing actual damage, as if the defendant had died in the mean time. But the duty imposed by the writ was, to have the defendant ready to be produced at the return. The law and authorities on this point, before the statute, appear in *Posterne v. Hanson*, 2 Saund. 59, and note (4) to the same case, 2 Wms. Saund. 61 a; and the statute does not make any change as to the duty of producing the defendant at the return. Assuming that the sheriff, although not ruled, might be bound to arrest and have the defendant ready before the return day, still the declaration is defective in alleging only that before the commencement of the suit "a reasonable time had elapsed" for arresting, yet the defendant, though

(a) June 20th. Before Lord Denman, C. J., Littledale, Patteson, and Williams, J.

(b) See p. 711. S. C. Tyr. & G. 1033.

he had opportunities, did not arrest. By the new form of *capias*, the sheriff, on executing the writ, is to give the defendant notice to put in special bail within eight days. It should have been averred that the sheriff omitted to arrest, having an opportunity, and that bail was not put in for eight days afterwards, and before the commencement of this suit. In *Brown v. Jarvis*, Lord ABINGER, C. B., in delivering judgment said, "If it had appeared on the face of the declaration that the plaintiff had not sustained any damage from the sheriff's negligence, the judgment must have been arrested; and I do not think the plaintiff could have maintained the action without proof of actual damage." But he concluded that, on the declaration before the Court, the plaintiff appeared to have sustained a damage from the defendant's negligence. And in fact a special damage was averred, namely, that the debtor, being at large, met with an accident which would not have befallen him if he had been in custody, by reason of which he died. Here no damage is particularly alleged. And there it was averred that the defendant might have arrested the debtor after the delivery of the writ, and more than eight days before his death.

Bere, contra. The real question in *Brown v. Jarvis*, 1 M. & W. 704, S. C. Tyr. & G. 1033, was, whether, under stat. 2 W. 4, c. 39, the sheriff was bound to execute the *capias* in a reasonable time; and the Court ultimately decided that he was. Lord ABINGER, C. B., said, in delivering judgment, "We think that it is the duty of the sheriff to arrest the party on the first opportunity that he can, and, if he does not do so, that he is guilty of negligence, and will be liable for any damage which may result from that negligence." Many dicta to the same effect were thrown out during the argument; and the observation of Lord ABINGER, C. B., first cited on the other side, does not appear to have been upheld on the further discussion. That case is not distinguishable from the present. As to damage, the Court there took it for granted, some injury being alleged in the declaration, that there was a real damage. Here a damage is alleged and not denied; the Court will not inquire into its nature. And it is shown to have arisen from neglect of opportunities. It is contended that eight days should appear to have elapsed between the neglect and commencement of the action. If this objection were of any weight, the plaintiff should have leave to amend. *Brown v. Jarvis* was not reported at the time of the joinder in demurrer. But, in the form referred to by stat. 2 W. 4, c. 39, s. 4, the eight days count from the "execution:" here none took place; there is no time, therefore, from which the days can run. And, in fact, the days are mentioned in the schedule merely by way of notice to the defendant. The clause relative to them is no part of the mandate to the sheriff. He is to take, and safely keep the defendant, till he shall have given bail. Where no time is prescribed, a reasonable time is always understood. The memorandum, "This writ is to be executed within four calendar months from the date thereof," merely refers to the enactment in sect. 10, that no writ issued under the act shall run for more than four calendar months from the date. [PATTERSON, J. The writ requires the sheriff to return it, if unexecuted, at the expiration of four calendar months from the date.] In *Jacobs v. Humphrey*, 2 Cro. & M. 413; S. C. 4 Tyr. 272, an action was held maintainable for not selling goods within a reasonable time before the return of a venditioni exponas, though the sheriff had not been ruled, and no time appears to have been specified by the writ.

Cowling, in reply. *Jacobs v. Humphrey* supports the argument for the defendant, for the declaration there stated that the sheriff had not the money arising from the sale at Westminster, &c., at the return day of the writ. That case shows that an actual ruling of the sheriff to return the writ is not necessary, but that the return day must be past before a right of action attaches. [PATTERSON, J. According to your argument the sheriff may put off the return by his own negligence for any length of time within four months.] The plaintiff may rule him to return the writ. If he makes default, an action lies; that is, after the eight days have elapsed, but not immediately on the default. And the default of itself is not sufficient: there must be a legal grievance, (a) and that cannot have arisen till the expiration of four months, or at least of the eight days for putting in bail. [PATTERSON, J. From what period would you reckon the eight days in such a case as this?] From the time when the sheriff had an opportunity to arrest, and omitted doing so. In *Aireton v. Davis*, 9 Bing. 740, (23 E. C. L. R. 448,) the declaration seems to have been conformable to the principles here relied upon. [Some defects in the declaration, adverted to by the Court during the argument, will be found sufficiently noticed in the judgment.]

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.

There are many defects in this declaration. It is not stated that the writ was delivered to the sheriff within four calendar months from the issuing. That perhaps is matter of special demurrer only. Again, it is not stated that the sheriff was guilty of any negligence more than eight days before the commencement of the suit. Now, if the original defendant had been arrested and let go without bail or deposit, still bail above might be put in within eight days from the arrest, and no action would lie against the sheriff until after those eight days. So here, if the plaintiff means to say that the neglect to arrest when he might is, as against the sheriff, equivalent to an arrest and escape, yet, if bail were put in within eight days from such negligence, it would be good. The declaration, therefore, ought to have shown that eight days had elapsed without bail being put in before the commencement of the suit. It is indeed alleged that the original defendant did not put in bail according to the exigency of the writ; and perhaps that might be sufficient on general demurrer, which this is. Again, no damage is stated, unless some legal damage necessarily results from the neglect of the sheriff. We do not think that any such damage does necessarily result. Consistently with all that is stated in this declaration, the sheriff may, after a reasonable time had elapsed, and after his negligence, have arrested the original defendant, and the plaintiff may have been able to prosecute his action and bring it on to trial quite as soon as if the sheriff had arrested on the first opportunity. We agree with the case of *Brown v. Jarvis*, that it is the duty of the sheriff to arrest the party on the first opportunity that he can; but we also agree with the Court in that case, that some actual damage must be shown in order to make the negligence of the sheriff in that respect a cause of action; and none such is shown on this declaration. On default made after the writ is returnable, some legal damage necessarily arises, because a new writ is necessary. On this ground we think that judgment must be given for the defendant.

(a) Lord Denman, C. J., mentioned *Williams v. Mostyn*, 4 M. & W. 145.

But we have also great doubt whether it is not necessary to show that the writ was returnable, and some default made when so returnable. Formerly the return day was fixed in the writ itself. Now it is fixed, either by the fact of its being executed, or by an order of a judge, or by lapse of four calendar months. It was the duty of the sheriff, under the old process, to arrest the defendant on the first opportunity, as much as it is now; and, though no action would lie till after the return day, because the sheriff, having neglected his duty once, might still repair that neglect by arresting the defendant and having him ready at the return day, yet he ran the risk of being able to do so after once having neglected. So now, having once neglected his duty, yet if, on being called on to return the writ, he chose to return *cepi corpus*, and were to put in bail within eight days from that return, it may be very doubtful whether any action would lie. The sheriff ought, undoubtedly, to arrest as soon as possible, and so make the writ returnable as soon as possible, and return it; but, if he does not, the plaintiff has the means of making the writ returnable and obtaining the fruit of it by bail being put in, or, if not, by an action against the sheriff. Again, it is quite consistent with all that is stated in this declaration, there being no averment of the writ being returnable, that the sheriff may have taken a deposit of the money without actually arresting, and so there may be no breach of duty at all. However, as this objection was taken in *Brown v. Jarvis*, 1 M. & W. 704; S. C. Tyr. & G. 1033, and did not prevail, we do not decide upon any such doubt.

Judgment for defendant.

The QUEEN against the Select Vestry of the Parish of ST. MARGARET, in the Borough of LEICESTER.—p. 730.

Where an act of parliament authorized and required a select vestry from time to time, as often as occasion required, to make rates for the relief of the poor and the repair of churches and highways in the parish: Held, that they were not compellable to make a church rate upon demand, while the churchwardens refused to state the necessary amount, or to furnish any estimate of it, or to give to the vestry any information whereby they might ascertain it.

MANDAMUS (a) to the select vestry of the parish of St. Margaret, in the borough of Leicester, to levy and assess a rate according to the directions of stat. 2 W. 4, c. x., (local and personal, public,) of sufficient amount to defray all expenses required for the repair of the churches and burial ground of the parish, and for defraying all the expenses incidental thereto or connected therewith, &c., during their year of office; and to do every act necessary to be done in order to levying and assessing such rate, &c. (b)

(a) See the argument on granting the writ, *Regina v. The Select Vestrymen of St. Margaret, Leicester*, 8 A. & E. 889.

(b) Sect. 39 enacts that it shall be lawful for the select vestry for the time being, and they are hereby authorized and required, from time to time, as often as occasion shall require, to lay and assess upon all and every the tenants and occupiers of houses, &c., within the parish, according to the respective annual value thereof, rates for the maintenance and relief of the poor of the said parish, &c., and rates for the support and repair of the churches and burial ground of the said parish, and for defraying all the expenses incident thereto, or connected therewith, or for any purpose to which church-rates are or shall by law be applicable; and also rates for defraying the expenses to be incurred in repairing the highways, streets, and roads within the said parish, &c.

The return to the above writ stated, among other things, that the select vestry had met together in obedience to the writ, and that G. Marston, one of the churchwardens, being the only one then present, was required to state to the vestry the amount of money necessary for the purposes mentioned in the writ, and to furnish to them an estimate of the works necessary for the support and repair of the churches and burial ground, and an account of the necessary expenses incident thereto and connected therewith, &c., in order to enable the vestry to lay and assess a rate according to the directions of the said act. That at such meeting the churchwardens then wholly neglected and refused to state, &c., or to furnish, &c., or to give to the said vestry any information by which they might ascertain and determine the rate which should be laid and assessed according to the directions of the act, and in obedience to the said writ. That the meeting was then adjourned, in order to afford the churchwardens an opportunity to furnish such statement, estimate, account, or information. That the vestry again assembled in obedience to the writ, but that at neither of the meetings, nor at any other time or place, did the churchwardens, or either of them, state to the vestry the amount of money necessary for the purposes in the writ mentioned, or furnish to them any estimate of the works necessary for the support and repair, &c., or give them any information whereby the vestry could ascertain and determine the rate which should be assessed according to the statute and in obedience to the writ, but wholly neglected and refused, and thence continually have wholly neglected and refused, to state the said necessary amount, or to furnish any such estimate or information, by reason whereof the select vestry are unable to lay and assess any rate according to the directions of the act and in obedience to the said writ.

This Court having refused to quash the above return upon motion, the case was set down for argument in the crown paper.

Balguj for the crown.(a) The vestry are bound by the act to make a rate, though the churchwardens may not have given any estimate. They are as capable of making the estimate as the churchwardens; and sect. 63 of the act gives them power to deduct from the rate any expenses they may be put to in the discharge of their duty; but the churchwardens have no such power.

Mellor, contra. The return is sufficient: the facts stated in it must be

By sect. 63, the moneys from time to time received by virtue of this act, under the rates called church-rates, shall (after payment of the costs, charges, and expenses attending the collecting, receiving, and managing the same) be paid over by the select vestry to the churchwardens, or one of them, for the time being, to be by them or him applied and accounted for in manner as by law established.

By sect. 93, an appeal to the quarter sessions of the borough or county is given to any person who shall think himself aggrieved by any survey, valuation, sale, or other act or matter made, done, or arising under or in pursuance of the act, &c.

By sect. 21, the vestry is required to keep a book or books, and to cause regular accounts to be entered therein of all sums of money received and expended for or on account of the parish under the authority of the act, which books are to be open to the inspection of all ratepayers, &c.

Sect. 108 provides that the act shall not extend to invalidate or avoid any ecclesiastical law or constitution of the Church of England, or to abridge or control the rights or powers of the Bishop of Lincoln, &c., or of any other person having ecclesiastical jurisdiction in or over the parish, or any matter or thing concerning the churches of the parish, &c.

(a) In the course of argument, *Balguj* referred to the affidavits used in support of the former motion to quash the return: but, *per Curiam*, on a concilium, no objection lies to a return except for matter on the face of it.

taken to be true; and no collusion or improper motive can be implied. The only fault is with the churchwardens, who obstinately refuse to supply the necessary information to the select vestry. Without such information a rate made by the vestry must be made at the hazard of turning out a bad or an insufficient one; for, if it be unnecessarily high, it will be illegal; *Brettell v. Wilmot*, 2 Lee's Ecc. Rep. 548; and, if it be not high enough to cover the expense of repairs, then another must be made, which will be retrospective, and therefore bad. The uniform practice is for the churchwardens to make a survey, and to lay an estimate of the expense of repairs before the vestry when a rate is required; *Prideaux, Directions to Churchwardens*, p. 67—70, (10th ed.) In *Veley v. Burder* (a) the libel, which was for non-payment of a church rate, alleged a survey and estimate; the same course was pursued in *Harrington v. Stow*, (b) and is represented by the Court as the proper course in *Brettell v. Wilmot*. Many items of expenditure are of a nature that requires the express assent of the vestry, as bells, organs, &c.; *Pearce v. The Rector of Clapham*, 3 Hagg. Ecc. Rep. 16, *Jay v. Webber*, Id. 7. These may be very properly submitted to the consideration of the vestry; but the vestry ought at least to be informed of the probable expense of them. It is said that the vestry may as easily estimate the expense of repairs as the churchwardens; but no one, except the minister and churchwardens, has a right to enter the church when not open for divine service; *Jarratt v. Steele*, 3 Phill. Ecc. Rep. 169, per Curiam; *Lee v. Matthews*, 3 Hagg. Ecc. Rep. 173, per Curiam. The freehold, both of that and of the church-yard, is in the parson, while the oversight and care of them belong to the churchwardens; canon 85, (1603,) cited in 1 Gibson's *Codex Jur. Ecc. Anglic.* p. 194, (2d ed.) The expense of such an estimate may be lawfully charged by them on the rate. The right and duties of churchwardens remain exactly as before, notwithstanding the statute, which, by sect. 103, provides for the continuance of all ecclesiastical laws.

Balguy, in reply. The statute expressly throws on the vestry the duty of making rates, and the churchwardens have no longer any concern with the making of them. Incidentally to this duty, the vestrymen may of course enter into and survey the fabric, and do everything necessary for the effectual execution of their office. They can, at all events, look at their own books, which they are directed by sect. 21 to keep, and ascertain from them the average expenses. [PATTESON, J. The books will show only what the vestry has paid to the churchwardens; not what the churchwardens have laid out.]

LORD DENMAN, C. J. The churchwardens are bound to make some estimate for the guidance of the vestry, or, at least, to give them information as to the amount of the current expenses, and ordinary wants of the parishioners. The churchwardens have the best means of obtaining the proper information on these matters. They have a control over part of the church, and the general care and custody of the property belonging to the parish. The statute has not altered their duties in this respect.

PATTESON, J. The same section which provides for the making of church rates also applies to poor rates and highway rates. If, therefore,

(a) *Braintree Church Rate Case*, Consist. Court, reported by G. W. Johnson, Esq., ed. 1887; since reported 1 Curt. Ecc. Rep. 872.

(b) Cited from a MS. in a pamphlet by Dr. Nicholl, (ed. 1837), entitled "Observations on the Attorney-General's letter to Lord Stanley."

the vestry are bound to find out the requisite amount to be raised in one case, they must also do it in the other cases. This would be a very extraordinary construction to put upon the act. I think the vestry cannot be compelled to make the rate, as long as the churchwardens refuse to give to them any information for the purpose of ascertaining the necessary amount.

WILLIAMS, J. concurred.
S.

Judgment for the defendants.

The QUEEN against The Governors and Directors of the Poor of the United Parishes of ST. ANDREW, HOLBORN, above the Bars, and ST. GEORGE the MARTYR, in the County of MIDDLESEX, and C. BOYDELL, their Clerk.—p. 736.

Mandamus to the officers of a parish included in an union, (formed under 4 & 5 W. 4, c. 76, s. 26,) reciting the due appointment of certain persons to be guardians of the poor of the union, and directing them to pay a sum, out of the poor rates collected by them, to the treasurer of the union. Return, that the said supposed guardians were not, nor were any of them, duly appointed under the provisions of the act, &c.; and that, at the issuing of the said writ, the said supposed guardians therein mentioned were not, nor were any of them, guardians of the poor of the said union.

Held, that the return was insufficient for not distinctly setting forth any defect in the appointment.

Return quashed on motion, and peremptory mandamus awarded.

MANDAMUS to the governors and directors of the poor of the above parishes, appointed under stat. 6 G. 4, c. clxxv., (local and personal, public,) and to C. Boydell, their clerk, reciting the formation of the said parishes into a union under 4 & 5 W. 4, c. 76, and "that, under the provisions of the last-mentioned act of parliament, and under the rules, orders, and regulations of the said Poor Law Commissioners, certain persons have been duly appointed guardians of the poor of the said union, and, as such guardians, have taken upon themselves the maintaining, providing for, regulation, and employment of the poor of the said union;" the issuing of a precept by the said guardians, under the provisions of the last-mentioned act, and the rules and regulations of the said commissioners, directed to the defendants, requiring them to pay a certain sum to the treasurer of the union out of the poor rates of the united parishes, collected by them, towards the relief of the poor of the said parishes, and towards defraying such proportion of the general expenses of the union as was lawfully chargeable thereon; and the refusal of defendants to obey the precept; and commanding them forthwith to obey the said precept, and to pay the said sum to the treasurer, or to collect it by a rate to be made for that purpose, &c.

The return to the writ was in the following words. "We, the major part of the said governors and directors, and the said Charles Boydell, do humbly certify and return to our said Lady the Queen, upon the day and at the place in the said writ mentioned, that the said supposed guardians of the poor of the said union, in the said writ mentioned, were not, and never have been, and are not now, nor were, nor are any of them, duly appointed guardians of the poor of the said union, under the provisions of the said act of parliament in the said writ secondly mentioned, or under the said rules, order, and regulations of the said Poor Law Commissioners therein in that behalf also mentioned, as in and by the said

writ is stated and supposed; and that, at the time of the coming of the said writ to us, the said supposed guardians of the poor of the said union therein mentioned were not, nor have they been, nor are they now, nor were nor are any of them, guardians of the poor of the said union. Wherefore we, the major part of the said governors and directors, and the said Charles Boydell, have refused, and still do refuse, to obey the said precept in the said writ mentioned, as in and by the said writ we are commanded."

Sir *J. Campbell*, Attorney-General, in Trinity term last, obtained a rule to show cause why the return should not be quashed for insufficiency, and a peremptory mandamus awarded. Several objections were made to the return; but, as the judgment of the Court proceeded only on one of them, namely, that it did not specify the grounds on which the appointment of guardians was supposed to be illegal or void, the rest have not been noticed. On the last day of the term, (a)

Sir *F. Pollock* and *Erle* showed cause, and contended that the return was sufficient, referring to the cases in which a return of "not duly elected" had been held to be sufficient on a mandamus to admit to offices; *Rex v. Williams*, 8 B. & C. 681.

Sir *J. Campbell*, Attorney-General, and *Tomlinson*, contra, contended that the return was too general; and they relied upon *Rex v. The Mayor, &c., of Doncaster*, 2 Lord Raym. 1564, *Rex v. The Mayor and Aldermen of Doncaster*, Sayer's Rep. 37, and *Rex v. Mayor, &c., of Liverpool*, 2 Burr. 723. They also contended that, although the appointment might have been irregular, it continued in force until duly avoided.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

A mandamus issued to the governors and directors of the poor of St. Andrew's, Holborn, to pay moneys, collected for the relief of the poor under an order of the Poor Law Commissioners, to a board of guardians of an union described in that order as duly appointed. The governors and directors returned to this writ that the guardians were not duly appointed. We have been called on to quash this return on motion, and award a peremptory mandamus, on the ground that it is manifestly bad and illusory. On the other hand, the return is contended for as good, by reference to proceedings on mandamus to corporate officers bound to admit by swearing in persons elected, where "not duly elected" has been in several cases, particularly in those most lately decided, holden a good return. But we think the distinction clear; the person elected has no right to compel admission without showing a good title in omnibus, and must be prepared to prove it. If his election, de facto made, is bad in law for any defect, it would be wrong to admit him. But, in this case, the commissioners have power to form unions; elections of boards are to be made as the act directs. This board is in full exercise of all its authority; moneys collected for the use of the poor are to be paid according to orders issued by the commissioners; and their orders have the force of law, unless and until they are set aside by this Court. Here they can do the thing required; and those who obey their orders will incur no responsibility by doing so. If there really were any doubt whether the existing guardians are duly appointed, it must arise from some defect existing in point of fact, which ought to be distinctly set forth by any one who disputes their prima facie power. If any such

(a) Wednesday, June 12, 1839, before Lord Denman, C. J., Little Dale and Patteson, Js.

fact had been returned to the writ, we might have exercised our judgment whether, if established, it would have defeated the commissioners' authority; but the statement that, for some undisclosed reason, the parties charged with a plain duty refused to perform it because they chose to say, in general terms, that those to whom they are bound are not duly appointed to their office, is wholly insufficient.

A peremptory mandamus must therefore go. Rule absolute.(a)

(a) As to quashing a return on motion, see *Regina v. Payn*, 6 A. & E. 392, 402, (33 E. C. L. R. ;) *Regina v. St. Saviour's, Southwark*, 7 A. & E. 925, (34 E. C. L. R.)

The QUEEN against JOHNSON.—p. 740.

Under stat. 5 & 6 W. 4, c. 76, s. 114, the county treasurer may order the council of any borough within the county, having separate quarter sessions, to pay the county the expenses of prisoners committed from such borough for trial at the assizes and confined in the county gaol, though such prisoners were committed before trial to the borough gaol, not the county gaol, and were not confined in the county gaol till after the bills against them were found.

And such order may be made without any contract between the borough and county justices.

The expenses are to be estimated by dividing the whole expenses of the gaol according to the number of prisoners and the periods of their confinement, and are not limited to the expenses incurred in respect of the individual prisoners.

GREAVES obtained a rule in Hilary term, 1838, calling on the prosecutors to show cause why an order of COLERIDGE, J., described in the rule, should not be quashed for the insufficiency thereof, and the award and all other proceedings had thereon be set aside.

The order (dated 28th July, 1837) recited that it had been proved before Sir J. T. COLERIDGE, &c., one of the justices of assize for the county of Hereford, that, on 7th July then instant, a statement or account in writing was made and sent by the treasurer of the county to the council of the city or borough of Hereford, purporting to be a statement or account of the costs of maintenance, in the gaol of the county, of certain offenders therein named, committed from the borough (in which a separate court of quarter sessions of the peace is holden) for trial at the assizes of the county, from 1st January to 1st July, 1837: that an order, dated 7th July then instant, was made by the treasurer upon the council, for payment of 28*l.* 15*s.* 6*d.* for the maintenance of the said offenders in the county gaol, with the further sum of 10*s.* for the reasonable costs and charges of making and sending such account: and that a difference had arisen between the parties concerning the account, and such difference had not been adjusted by agreement between themselves. The order then proceeded as follows. "Now I do therefore, in pursuance of the statutes in such case," &c., "on the application of the said," &c., "as such treasurer as aforesaid, one of the said parties, nominate, by this writing under my hand, Charles Thapland Whitmore, Esq., Barrister at law, not having any interest in the question, to arbitrate between the parties, according to the powers and provisions of the several statutes made and now in force for that purpose: and, by consent of the said parties, I do hereby direct that the said arbitrator shall state specially the facts as to the commitment of the said several prisoners in the said account mentioned, and as to the mode in which

the said prisoners were transferred from the prison in and for the said city or borough of Hereford to the prison in and for the said county, and all other matters touching the same, in order that the opinion of the Court of Queen's Bench may be taken on the same; and shall further find the sum which ought to be paid for maintenance of each prisoner per week in the said county prison by the council of the said borough."

The award recited the above order, and proceeded as follows. "Firstly, I do find that, for several years before and until" 27th June, 1836, "a contract had been made, and existed, between the justices of the peace of the city of Hereford and the justices of the peace of the county of Hereford, for the support and maintenance, at 5s. per head a week, in the gaol or house of correction of the said county, of any prisoners committed thereto from the city aforesaid, pursuant to the statute 5 G. 4, c. 85, intituled," &c.; "which contract was put an end to on the said" 27th June, 1836; "and during that period, and from thenceforward until the passing of the statute 5 & 6 W. 4, c. 76, intituled," &c., "prisoners intended to be tried at the assizes have been, in the first instance, committed to the city prison, and, at the assizes, have been taken into the shire hall, and there, as soon as a bill against them was found, delivered by the gaoler of the city prison to the gaoler of the county prison; and, in case of conviction, they have invariably been committed to the county prison, or house of correction. The same practice has been pursued with regard to the prisoners touching whom the present question arises. These prisoners were severally committed to the city prison for trial at the assizes for the county, and, after conviction, were committed in execution of their sentences to the county prison: and the charges in question are in respect of their imprisonment therein under the circumstances above stated. These charges are made upon a calculation of the proportion which the expense of each prisoner bears to the total expenses of the gaol, on the average of one year, as set forth in the paper marked A., annexed to this my award. And, it being agreed by the parties that the order of the treasurer, marked B., hereunto annexed, shall have the same effect as if it were an order for the costs of the maintenance and punishment of the prisoners, and not of their maintenance only, I do find and award that, if the council of the city or borough of Hereford are by law liable in respect of prisoners committed to the county gaol in manner hereinbefore stated, and if it is considered that the said council are liable for the proportion of each of such prisoners to the general expenses of the gaol, then the sum of 9s. a week for each of such prisoners ought to be paid by the said council to the treasurer of the said county: but, if it is considered that the said council are liable only for the personal expenses of such prisoners, that is, in respect of their clothing, washing, fuel, wear and tear of furniture, punishment, and such other expenses as are a charge upon the gaol, directly and solely occasioned by their imprisonment therein, then I find and award that the said council ought to pay to the said treasurer the sum of 5s. a week for each of such prisoners."

The paper marked A., annexed to the award, was signed by the clerk to the gaol, and headed "Statement of Expenses of the Hereford County Gaol from Easter, 1836, to Easter, 1837." The statement comprehended the whole expenses of the gaol, without reference to particular prisoners, under the heads "Salaries," "Cash payments," "Repairs," "Manufactory," "Grain," "Coals," "Meat," "Groceries," "Books,"

"Insurance," "Taxes." From the sum total there was a deduction, entitled "C. By grain ground for hire, and articles sold." The balance was 1613*l.* 16*s.* A calculation as follows was added.

The number of prisoners for every day throughout the year, from Easter, 1836, to Easter, 1837, added together, the total number is 22,972.

365)22972

$62\frac{342}{365}$ average per day.

	£	s.	d.	
52)1613	16	0	0	total expenses per annum.
7)	31	0	8½	- - per week.
63)	4	8	8	- - per day.
	1	4½	7	- - per head per day.
	9	9½	-	- - per head per week.

Paper B. contained the names of the prisoners from Hereford, with the several periods of their detention in the prison, and the expense for each, estimated at 9*s.* per week; the whole amounting to 28*l.* 15*s.* 6*d.* The treasurer's order on the council for that sum, with 10*s.* for the reasonable costs and charges of making and sending the account, was written under the account, and signed by the treasurer, dated 7th July, 1837.

In last Michaelmas term,(a)

Sir *W. W. Follett* and *R. V. Richards* showed cause. First, the borough is bound to contribute to the expenses. The Municipal Corporation Act, stat. 5 & 6 W. 4, c. 76, s. 114, enacts "that the treasurer of every county in England and Wales shall keep an account of all costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of all offenders committed for trial to the assizes in such county from any borough in which a separate court of quarter sessions of the peace shall be holden;" and the treasurer is directed to send a copy of the account to the council, and to make an order on them for the payment; and the council are to order the same, with reasonable charges for the account, to be paid out of the borough fund: and, in case of any difference respecting the accounts, it is to be decided by the arbitration of a barrister appointed by the judge of assize, as under stat. 5 G. 4, c. 85, s. 2. Here the prisoners were committed for trial at the assizes, from Hereford, which has a separate quarter session. It will be argued, on the other side, that sect. 114 does not apply, because the prisoners were not committed for trial to the county gaol, but to the borough gaol, and were afterwards committed to the county gaol only in execution of the sentence. But the act does not make it necessary that the committal for trial should be to the county gaol; all that is required is that the committal should be from the borough (that is, by the borough justices), and for trial at the assizes. The intention is to

(a) Wednesday, November 14th, 1838. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js. The case was set down in the crown paper, but was not argued on concilium.

h contribute to the expense of its own criminals. There enactments and decisions as to the liability to such a v. *Clarke*, 5 B. & Ald. 665, it was held that the jurisdiction to try felons, was not within the 5 G. 3, c. 51, which exempts from the county the limits of any liberties or franchises it being considered that the separate in co-extensive with that of the county rate. The principle of this decision cases of the felons of her own district upon more bound to contribute. That principle ap- *Clarke*, it is true, the borough justices committed for trial. That also was the case in *Rex v. Shepherd*, where the borough of Marlborough was held to be exempt rates, although it had no jurisdiction to try felonies; and tion between that case and *Rex v. Clarke* was that Marlbo- did, and Bath did not, raise within itself a rate in the nature of county rate. In *Mercer v. Davis*, 10 B. & C. 617, the nature of the jurisdiction which would make a borough liable to the county rate was discussed. These cases do not directly apply to questions under stat. 5 & 6 W. 4, c. 76, s. 114. Stat. 4 G. 4, c. 64, s. 8, gives the justices of certain places, of which Hereford is not one, power to commit to the county house of correction. This does not affect the present case, which arises entirely under stat. 5 & 6 W. 4, c. 76. Nor do the provisions of stat. 5 G. 4, c. 85, apply, which enables justices, &c., "having the government or ordering of any gaol or house of correction, in any city, town, borough, port or liberty, to contract with the justices of the peace, having authority or jurisdiction in and over any gaol or house of correction of the county, riding or division, wherein or whereto such city," &c., "is situate or adjacent," "for the support and maintenance, in such last-mentioned gaol or house of correction, of any prisoners committed thereto, from such city," &c.; and enacts that "during the existence of such contract, every prisoner who would otherwise be confined in the gaol or house of correction of the city," &c., "so contracting, may be lawfully committed or removed to and confined in the gaol or house of correction so receiving him or her under such contract; and all prisoners so confined by contract, whether before or after trial, shall be subject in all matters and things to the same rules and regulations as if they were committed thereto by any of the justices of the county, riding, or division." As some boroughs had, and some had not, without contract, the power of committing to the county gaol, and as, in the latter case, there were sometimes contracts for that purpose, stat. 5 & 6 W. 4, c. 76, s. 114, was intended to put an end to the varieties in this respect, and to give the county a general right of demanding from the borough all the expense to which the borough had put the county. Sect. 117 gives counties the power of so recovering all such expenses, which are not included under the heads of "prosecution, maintenance, and punishment, conveyance and transport of offenders committed for trial in such county," and (in the case specified) out of coroners' inquests.

Secondly, as to the amount. It seems reasonable that the general expenses of the gaol should be divided among all the prisoners: there can be no ground for fixing them upon one class rather than another. Otherwise the borough will have the benefit of the general expenses without contributing to them. For instance, the treadmill is paid for

out of the general expenses; but it is used for the punishment of borough prisoners as well as others.

Maule and Greaves, contra. The contract alone conferred the power of charging the borough for prisoners committed to the county gaol although the imprisonments there continued after the expiration of the contract. The contract took effect under stat. 5 G. 4, c. 85, s. 1; and it is only in such case that sect. 2 authorizes an award for the expenses. [COLERIDGE, J. The committal to the county gaol must have formed part of the sentence, in the case of these convicts. Sir *W. W. Follett*. It must have been so always: the judges of assize could commit to no other prison.] If so, the borough would be charged with the maintenance of convicts in a prison to which it did not send them. Before stat. 5 G. 4, c. 85, the justices in some boroughs had the power of committing to the county gaol: and that statute (sect. 1) gave to justices, having the government of any gaol or house of correction in any borough, &c., the power of contracting with the justices having the authority over the county gaol, for the maintenance of prisoners "committed thereto, from such city, town, borough," &c. So far there can be no power except by contract, or by the borough having possessed the right, independently of contract, to commit the prisoners to the county gaol; as, by stat. 4 G. 4, c. 64, s. 8, the justices of certain places (not including Hereford) have power to commit to the county house of correction. In each case the borough is chargeable for the expenses only of prisoners committed from the borough to the county gaol, which the prisoners in this case are not. Then no new power is conferred by the Municipal Corporation Act: sect. 114 merely regulates the mode of keeping the account and obtaining payment. Jurisdiction cannot be given by implication. It is suggested that the words in sect. 114, "committed for trial to the assizes in such county from any borough," will include committals to the borough gaol; but that would be a very forced construction; and, according to it, the treasurer of the county would be directed by the statute to keep account of the expenses incurred in the borough gaol, and to charge the borough with them, which is absurd. Whenever any justices, not having the government of a gaol, have powers given to them relating to that gaol, it is by express words, as in stat. 5 & 6 W. 4, c. 76, s. 115, and stat. 6 & 7 W. 4, c. 105, s. 1. And the language of both acts shows that, whenever the committal for trial is made a condition precedent to the right to recover the expenses, the committal meant is a committal to the prison in which the expenses are incurred. In sect. 2 of stat. 6 & 7 W. 4, c. 105, provision is made for the case of the prison being more than two miles from the borough from which the committal is made. The inconveniences of any construction but that now suggested are manifest. Where a contract is made, there is a limit to the expenses: but, according to the construction adopted on the other side, the borough would be liable for expenses which it could not control or superintend, and without its consent. At the trial the liability falls on the county, not in consequence of any act of the borough, but because the assizes are held in the county, and the execution of the sentence is consigned to the county authorities. [WILLIAMS, J. Do you give any meaning to the words in sect. 114 of stat. 5 & 6 W. 4, c. 76, "any borough in which a separate court of quarter sessions of the peace shall be holden?"] That restriction was necessary to distinguish the case from a committal by county justices from a place not having criminal jurisdiction. There

no enactment was necessary; and the county would pay the expenses, of course.

As to the question of amount: the statute clearly intended that such expenses should be charged upon the borough as the borough had occasioned to the county. The general expenses of the county gaol must have been incurred at all events. Could the county build a new gaol and charge the borough with a share of the expense? The expenses here charged do, in fact, contain many such items. Sect. 117 of stat. 5 & 6 W. 4, c. 76, shows that only such places as were previously contributory to the county rates are to contribute to any expenses except those "arising out of the prosecution, maintenance, and punishment, conveyance and transport of offenders committed for trial in such county:" and this only by express provision. Sect. 92 enumerates separately, as expenses to which (among others) the borough fund is to be applied, "the expenses of the prosecution, maintenance, and punishment of offenders," and "such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided," (referring evidently to sect. 114), and "the expense of maintaining the borough gaol, house of correction," &c.; but the maintenance of the county gaol is nowhere mentioned. Stat. 5 G. 4, c. 85, s. 4, gives borough magistrates express power to contract to pay a share of the expense of enlarging the county gaol. This shows that there was no such liability in the absence of contract: and sect. 15 prevents the alteration of previously existing liabilities, either as to repair of the prison or maintenance of the prisoners. The distinction between building or repairing a gaol, and maintaining it, is relied on by Lord TENTERDEN in *Rex v. The Justices of Kingston-upon-Hull*.(a) *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation, (June 21st,) delivered the judgment of the Court.

This case came before us upon an application to quash an order made, on the 28th of July, 1837, by my brother COLERIDGE, as one of the justices of assize for the county of Hereford, whereby, it appearing that the treasurer of the said county had sent in an account in writing to the council of the city or borough of Hereford, of certain expenses incurred in respect of certain prisoners in the gaol of the said county, committed thereto from the said city or borough, and that the said treasurer had made an order upon the said council for payment, whereupon a difference had arisen between the said parties, the learned judge nominated a barrister to arbitrate between the parties. Such award was accordingly made; and the sum of 9s. per week was directed to be paid in respect of each prisoner so sent to the county gaol by the said council, if they should be thought liable, in respect of each such prisoner, to the "general expenses" of such gaol, and the sum of 5s. if the liability of the said council should be confined to the "personal expenses" of each such prisoner.

And the question is, whether the above-mentioned order be valid in point of law; having been made under the authority of stat. 5 & 6 W. 4, c. 76. Now, by the 114th section of that statute, it is enacted that the treasurer of every county "shall keep an account of all costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of all offenders committed for trial to the assizes in such county from any borough in which a separate court of quarter sessions" shall be holden (which is the case with respect to the said city or borough of

(a) Note (a) to *Thompson v. Raikes*, 1 A. & E. 880.

Hereford;) and the treasurer of every such county shall send a copy of such account to the council of each of such boroughs. Then follows a provision, of the nature described in the said order, under and by virtue of stat. 5 G. 4, c. 85, which is incorporated in the first-mentioned act, in the event of such difference as is in the said order also recited, and which had actually taken place. Then follows a provision that the power of contracting by borough justices with county justices for care and maintenance of borough prisoners, under the said act, 5 G. 4, c. 85, shall remain in force.

It was contended, against the jurisdiction to make the said order, that, inasmuch as, generally, the justices of the borough have no power of committing to the county gaol, and, further, as it appears from the said award, that a contract between the borough and county justices for the care and maintenance of borough prisoners no longer exists, the treasurer had no right to make the claim from which these proceedings originate. We however think that there is no inconsistency in the provisions of the two statutes; and that, if no contract be made, or in force, under stat. 5 G. 4, c. 85, the power given to the treasurer of the county under the said 114th section of stat. 5 & 6 W. 4, c. 76, may well be exercised.

It is observable, also, that the objection which we are noticing seemed to assume that the said section was applicable only to cases where borough prisoners are committed for trial to a county gaol; whereas the language is, "committed for trial to the assizes;" and we think that, without any violent or forced construction, we may consider prisoners who (according to the statement in the award) have first been committed to the city prison, and thence taken for trial to the shire-hall of the county, and, in case of conviction, have invariably been committed to the county prison or house of correction, as falling within this description. We are of opinion, therefore, that the learned Judge did possess jurisdiction, and that his order was properly made accordingly.

We are not sure whether, in the course of the discussion, any objection was made to the order, except that which we have already noticed and disposed of.

We think, however, that the larger amount of weekly charge for each prisoner, being "made upon a calculation of the proportion which the expense of each prisoner bears to the total expenses of the gaol," is reasonably made, and ought to be paid, seeing that the borough has a proportionable share of the benefits arising from the whole establishment.

The consequence is that the rule must be discharged.

Rule discharged.

JONES against FLINT.—p. 753.

Plaintiff and defendant orally agreed, (in August,) that defendant should give 45*l.* for the crop of corn on plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with defendant's; and that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; defendant was to harvest the corn, and dig up the potatoes; and plaintiff was to pay the tithe. Held, that it did not appear to be the intention of the parties to contract for any interest in land, and the case was, therefore, not within the Statute of Frauds, 29 C. 2, c. 3, s. 4, but a sale of goods and chattels, as to all but the lay grass, and, as to that, a contract for the agistment of defendant's cattle.

DEBT. The declaration stated that defendant, to wit, on, &c., was indebted to plaintiff in 45*l.*, as well for a certain crop of growing wheat, and a certain crop of growing barley, of the plaintiff, before then bargained and sold by plaintiff to defendant at his request, and by defendant, under and by virtue of that bargain and sale, accepted, reaped, cut down, had, taken, and carried away, as also for a certain crop and divers quantities of potatoes of plaintiff, before then bargained and sold by plaintiff to defendant at his request, and by defendant, under and by virtue of that bargain and sale, accepted, dug up, had, taken, and carried away; as also for the use of certain land of plaintiff, and the eatage of grass, clover, and stubble thereon growing, and being by plaintiff before then let to defendant at his request, and by defendant, according to such letting, had and used in and for the depasturing of cattle for a long time before then elapsed; and in 45*l.* on an account stated. (a)

Pleas. 1. As to all but 35*l.* 11*s.* 10*d.*, nunquam indebitatus. Issue thereon.

2. As to 5*l.*, parcel of the 35*l.* 11*s.* 10*d.*, payment before the commencement of the suit, and acceptance in satisfaction and discharge of 5*l.* Replication, that defendant did not pay, and plaintiff did not accept, &c., in manner, &c. Issue thereon.

3. As to 30*l.* 11*s.* 10*d.*, other parcel, &c., tender before the commencement of the suit. Replication, denying the tender. Issue thereon.

On the trial before BOSANQUET, J., at the Denbighshire Spring assizes, 1837, it was proved that, in August, 1835, the plaintiff and defendant agreed orally that the defendant should give 45*l.* for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with the defendants; that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields. Defendant was to harvest the corn, and dig up the potatoes; and plaintiff was to pay the tithe. It did not distinctly appear whether the sale was by the acre or not. The crops, &c., were taken by the defendant in conformity with the agreement. The payment and tender were proved, as pleaded; and the defendant's counsel contended that the plaintiff was not entitled to recover on the first issue, because the contract proved was for an interest in land, within sect. 4 of the Statute of Frauds. The learned judge directed a verdict for the defendant on the second and third issues, and for the plaintiff on the first, reserving leave to move for a nonsuit. In Easter term, 1837, *Jervis* obtained a rule accordingly. In Hilary term last, (b)

Kelly and *Welsby* showed cause. No interest in land passed by this contract. Nothing was sold but crops, which, at the time of the delivery, would be goods within sect. 17 of stat. 29 C. 2, c. 3, and, as there has been acceptance, no writing was necessary. In *Evans v. Roberts*, 5 B. & C. 829, (12 E. C. L. R. 377,) it was held that a sale of growing potatoes

(a) The particulars of demand were as follows: "This action is brought to recover the sum of 45*l.*, as well for a crop of growing wheat and a certain crop of growing barley on the plaintiff's land, and a quantity of potatoes also growing thereon, sold by plaintiff to defendant, at his request, on 7th August, 1835, as also for the use of certain land of the plaintiff, and the eatage of grass, clover, and stubble thereon growing, and being by the plaintiff before then let to the defendant, at his request, and by the defendant, according to such letting, had and used in and for the depasturing of his cattle."

(b) Thursday, January 24th, 1839, before Lord Denman, C. J., Littledale, Williams, and Coleridge, J.

was not a sale of an interest in land. In *Crosby v. Wadsworth*, 6 East, 602, the sale of a growing crop of hay was held to be a sale of an interest in land; but there the vendee was to mow the hay. The doctrine ought not to be extended beyond the authorities; for it is notorious that occupiers of land continually make such bargains without any notion of parting with an interest in the land, or of giving at the utmost, more than a license. The buyer here would have been a trespasser if he had done more than carry away the crop. The inclination of the Courts has latterly been to hold similar bargains not to be for interests in land. It was so held in *Sainsbury v. Matthews*, 4 M. & W. 343, though the vendee was to find diggers. *Parker v. Staniland*, 11 East, 362, is in favour of the plaintiff.

Jervis and Meeson, contra. *Sainsbury v. Matthews*, (as PARKE, B., pointed out,) was a mere case of a sale to the plaintiff of potatoes; and the plaintiff, had the potatoes been destroyed before the time for digging arrived, would have had no other right to the land, though, till that time, the agreement was not perfected, because, till then, it would not be known what was sold. In *Evans v. Roberts*, the vendor was to dig the potatoes: he could not, therefore, have parted with the interest in the land. In *Parker v. Staniland*, the land was a mere place of deposit, as the potatoes were to be taken immediately; the land contributed nothing to the value of the article sold, after the sale. Here the crops, which include the grass growing, were to continue on the land; and the case, therefore, resembles *Earl of Falmouth v. Thomas*, 1 C. & M. 89; S. C. 3 Tyrwh. 26; and *Carrington v. Roots*, 2 M. & W. 248, where the contract was held to be for an interest in land. [COLERIDGE, J. In *Earl of Falmouth v. Thomas*, the pleadings expressly connected the bargain as to the crops with an interest in land.] The decision proceeds on general grounds. In *Carrington v. Roots*, the question arose incidentally; and it was held that the vendee could not insist on his right to enter the land and take the crops, because, by so doing, he claimed an interest in land, to which he was not entitled according to the Statute of Frauds.

Cur. adv. vult.

LORD DENMAN, C. J., in this vacation, (June 21st,) delivered the judgment of the Court. After stating the nature of the action, his lordship proceeded as follows:

A motion for a nonsuit was made, by leave, on the ground that the contract proved, which was oral only, was for an interest in land; this was denied in answer; and it was also contended that the state of the pleadings precluded the defendant from taking the objection. (a)

The contract was made in August, when the crops were not ripe, though nearly so; and the witnesses who proved it stated it thus. [His lordship then stated the terms of the contract as they are given, p. 754,

(a) One question on the pleadings was, whether the objection on the Statute of Frauds could be taken on the general issue. As to this, the following authorities were referred to: *Reg. Hil. 4 W. 4, Pleadings in particular Actions*, I, Assumpsit 1, 5 B. & Ad. vii.; *Johnson v. Dodgson*, 2 M. & W. 653; *Elliott v. Thomas*, 3 M. & W. 170; *Barnett v. Glossop*, 1 New Ca. 633, (27 E. C. L. R. 522;) *Carrington v. Roots*, 2 M. & W. 248; *Shearwood v. Hay*, 5 A. & E. 383, (31 E. C. L. R. 362.) See *Buttmere v. Hayes*, 5 M. & W. 456; *Eastwood v. Kenyon*, Hil. T. 1840, 11 A. & E.

Another question was as to the effect of the two pleas of partial tender and partial payment. As to this, the following authorities were referred to: *Ravenscroft v. Wise*, 1 C. M. & R. 303. S. C. 4 Tyrwh. 741; *Meager v. Smith*, 4 B. & Ad. 673, (24 E. C. L. R. 138;) *Middleton v. Brewer*, 1 Peake, N. P. C. 20, (3d ed.)

anté.] There was some dispute, upon the evidence, whether it was a sale by the acre or not.

Nothing, it will be observed, was expressly agreed on as to the possession of the land. It will be our duty, therefore, in construing the contract as to this particular, to have regard to its subject-matter, and to imply so much, and only so much, as is necessary to give full effect to its expressed terms, nothing appearing in the subsequent acts of the parties to influence our construction either way.

Three things were the subject-matter of the contract, crops of corn, potatoes, and the after eatage of stubble and lay grass. Of these all but the lay grass are fructus industriales; as such, they are seizable by the sheriff under a fieri facias, and go to the executor, not to the heir. If they had been ripe at the date of the contract, it may be considered now as quite settled that the contract would have been held to be a contract merely for the sale of goods and chattels. And, although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined, from this their original character, not to be on that account a contract for the sale of any interest in land. *Evans v. Roberts*, 5 B. & C. 829, (12 E. C. L. R. 377,) proceeds on this principle. That was a sale of growing potatoes. HOLROYD, J., says, (p. 837,) "This is to be considered a contract for the sale of goods and chattels to be delivered at a future period. Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute." And LITLEDALE, J., says, (p. 840,) "I think that a sale of any growing produce of the earth (reared by labour and expense) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land within the meaning of the fourth section of the statute of frauds." BAYLEY, J., lays down the same principle, and qualifies, not the judgment, but the dictum, of MANSFIELD, C. J., in *Emmerson v. Heelis*, 2 Taunt. 47, which certainly is at variance with the decision of the Court of King's Bench in *Evans v. Roberts*. It was a dictum, however, unnecessary to the decision.

The present case differs from *Evans v. Roberts*, in this, that there the potatoes were to be dug up by the seller; the judgments, however, do not proceed on this distinction, although it was not unnoticed. HOLROYD, J., expressly says, (p. 838,) that, even if they were to be dug up by the buyer, "I think he would not have had an interest in the land." And we agree that the safer grounds of decision are the legal character of the principal subject-matter of sale, and the consideration whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land. Tried by these tests, we think that, if the lay grass be excluded, the parties must be taken to have been dealing about goods and chattels, and that an easement of the right to enter the land, for the purpose of harvesting and carrying them away is all that was intended to be granted to the purchaser. It is very difficult to reconcile all the cases, and still more so all the dicta, on this subject, from the case of *Waddington v. Bristow*, 2 B. & P. 452, to the present time: and we are therefore left at liberty to abide by a general principle.

Upon this principle, however, we are to examine whether the intro-

duction of the lay grass into the contract ought to vary the decision. This is the natural produce of the land, not distinguishable from the land itself in legal contemplation, until actual severance; it passes accordingly to the heir, not to the executor; and in *Crosby v. Wadsworth*, 6 East, 602, it was decided that the purchaser of a crop of mowing grass, unripe, and which he was to cut, took an exclusive interest in the land before severance.

If, therefore, this be a case in which the parties intended a sale and purchase of the grass to be mowed or fed by the buyer, both on principle and authority the objection of the defendant must prevail.

Looking, however, at the facts, we think this was not such a bargain. It may well be doubted, upon all the evidence, whether any thing that could be called a crop of grass was in the ground, or in the contemplation of the parties at all: for it does not appear that any clover or other grass had been sown with the corn; and the word grass seems merely to have been adopted by the witness in cross-examination from the defendant's counsel. But, not relying upon this, we find that the plaintiff was to pay the tithe, and that, after the harvesting, he reserved to himself the right of turning his own cattle into the fields; and we think that, however expressed, the more reasonable construction of the contract is, that the possession of the field still remained with the owner after the harvesting, as before; it was not necessary to the vendee before, on account of the grass, because that, whatever it was, could not then be got at; nor did it need preservation; and afterwards it is more reasonable to consider the owner as agisting the vendee's cattle, than as having his own cattle agisted by him whose interest at the best was of so very limited a nature.

Upon these grounds, not impeaching the principle of *Crosby v. Wadsworth*, 6 East, 602, but deciding on the additional facts in this case, we think this incident in the contract does not alter its nature; and the objection founded on the statute will not prevail.

This makes it unnecessary to consider the other points, and the rule will be discharged.

Rule discharged.

DOE on the demise of HEIGHLEY against HARLAND and Others.—p. 761.

Where the lessor of the plaintiff in ejectment is son and heir of the lessor in a former ejectment, and claims under the same title, and against the same defendant, but brings his action for different premises, the Court will stay proceedings until the costs of the first action are paid. And this, although the lessor in the first action was discharged as an insolvent, while in custody under attachment for non-payment of such costs.

HUMFREY, in last Easter term, obtained a rule to show cause why an order, made by *PATTESON, J.*, in the Bail Court, for staying proceedings in this action till the costs of a former ejectment were paid, should not be set aside. The present action was brought by the son and heir of the lessor of the plaintiff in the former action, against the same defendants, and upon the same title, but for different premises. *Humfrey cited Doe dem. Taylor v. Harris*, 4 Mann. & Ry. 569, (a) as in point,

(a) It is said there, in the judgment of the Court, that the two ejectments were brought against different defendants.

where this Court, under similar circumstances, refused to stay proceedings. It also appeared that the lessor of the plaintiff in the first ejectment had been attached for non-payment of the costs, and had been discharged under the Insolvent Act, while in custody under such attachment. This, he contended, operated as a discharge of the costs, even if the Court should be disposed to stay proceedings on the other ground. On 12th June, in this term,

Cresswell showed cause. (a)

Cur. adv. vult.

LORD DENMAN, C. J., now delivered judgment as follows.

The case of *Doe dem. Taylor v. Harris*, 4 Mann. & Ry. 569, is contrary to all the other cases on this subject which are collected in Mr. Tidd's book, p. 1232, and by which it is clear that, where the title is the same, a second ejectment may be stayed until security for costs of a former ejectment is given, although the party suing in the second is not the same as in the first; for he must be privy in interest. We think, therefore, that there must be some mistake in the report of that case in omitting some peculiar circumstances; at all events we do not hold it binding. The other question is as to the effect of the discharge of the lessor of the plaintiff's father under the Insolvent Act, being then in custody under an attachment for these costs. Now that discharge is no actual satisfaction; and, as the only mode by which a defendant in ejectment can get his costs is by attachment, it is not like the case of a person taking his debtor under a ca. sa. when he might have sued out a fi. fa. There is a case in Barnes's Notes, (*Benn v. Denn dem. Mortimer*, Barnes, 180,) where it was held that, if a defendant had the lessor of the plaintiff in custody under an attachment, he could not stay his proceeding in a second ejectment; which may have been on the ground that by keeping him in custody he deprives him, in some sort, of the means of paying the costs of the first action; which ground does not exist here. This rule must be discharged, without costs.

Rule discharged. (b)

(a) Before Lord Denman, C. J., Littleale, and Patteson, J.

(b) See, as to the second point, *Doe dem. Standish v. Roe*, 5 B. & Ad. 878.

DOE against WRIGHT.—p. 763.

TRESPASS for mesne profits between 10th July, 1826, and the commencement of the suit. Pleas.

1. That plaintiff was not possessed of the premises modo et forma. 2. That the premises were the soil and freehold of defendant during all the time, &c. Replication, by way of estoppel to each plea, that after 10th July, 1826, plaintiff commenced an action of ejectment for recovery of the same premises on a demise laid 10th July, 1826, for fourteen years, and a demise laid 26th December, 1831, for seven years, and an ouster on 27th December, 1831, and had judgment to recover his said terms; concluding with a prayer of judgment if defendant ought, during the said terms, to be admitted, &c.

Held, on general demurrer, that the replication was good:

And that a rejoinder, stating that no writ of execution was ever issued, nor had plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined, was bad.

The plea of liberum tenementum admits a sufficient possession of the plaintiff to support an action against a wrong doer, but denies his rightful possession, and asserts a right to immediate possession in the defendant.

TRESPASS for mesne profits. The declaration, (13th June, 1837,) complaining of a breaking and entering, to wit, on 10th July, 1826, into
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the plaintiff's manors of Hornby and of Tatham, with the tithes and appurtenances, and the rectory of the parish of Tatham, and the tithes thereof, of the plaintiff, and other lands in the county of Lancaster, and expelling plaintiff from his possession thereof, and keeping and continuing plaintiff so expelled until the commencement of the action, and, during that time, taking the rents and profits thereof to defendant's own use.

Pleas: 1. That plaintiff was not possessed of the manors, rectory, tithes, and premises in the declaration mentioned, or any, or either of them, in manner and form, &c.: conclusion to the country.

2. As to breaking and entering the manors of H. and T., and the other lands, (omitting the tithes and rectory,) and expelling plaintiff from the possession thereof, and keeping him so expelled for the time in the declaration mentioned; that the same are, and were during all the time above-mentioned, the close, soil, and freehold of defendant, &c. Verification.

3. As to breaking and entering the tithes and rectory, that the same are, and were during all the time, &c., the freehold of defendant, &c. Verification.

Replication to the first plea, that defendant ought not to be admitted to plead the said plea, because, after the said 10th July, 1836, to wit, in Trinity term, 2 W. 4, in the court of our late lord the king, before the king himself, George Wright, the defendant in this suit, by the name of George Wright, late of H. in the county of Lancaster, yeoman, was attached to answer John Doe, (a) the plaintiff in this suit, wherefore the said G. Wright, with force and arms, broke and entered the manor of Hornby in the county of Lancaster with the appurtenances, and all the tithes arising therein; and the manor of Tatham with the appurtenances in the same county; and the rectory of the parish church of Tatham in the said county, and all the tithes within the said rectory and parish, which one Sandford Tatham had demised to the said John Doe for a term which had not then expired; and also wherefore the said George Wright, with force and arms, broke and entered a certain "other" manor of Hornby in the county of Lancaster, (repeating exactly the same premises as before,) which the said Sandford Tatham had demised to the said John Doe for a certain other term not then expired: and thereupon the said John Doe complained; (stating a declaration in ejectment on a demise of the first-mentioned premises on July 10th, 1826, and a demise of the secondly mentioned premises on 26th December, 1841, for the terms of fourteen and seven years respectively, and an ouster of plaintiff by the defendant from the several premises on 27th December, 1831, the said several terms therein, and each of them, then and at the time of the said complaint being unexpired; plea of not guilty, and issue thereon; trial at the assizes at Lancaster, August, 7 W. 4; verdict for plaintiff, and judgment of the Court of King's Bench in Michaelmas term, 11th November, 1836:) whereby the said John Doe recovered against the said George Wright his several terms aforesaid, then yet to come, of and in the several tenements aforesaid with the appurtenances, together with his damages, costs, and charges, &c.; as by the record and proceeding thereof, remaining in the said Court of

(a) As to former proceedings between the present parties, See *Wright v. Doe dem. Tatham*, 1 A. & E. 3, (28 E. C. L. R. 11.) *Same v. Same*, 7 A. & E. 313, (34 E. C. L. R. 95;) *Same v. Same*. 4 New Ca. 489. In 7 A. & E., p. 336, line 12, for 1836 read 1837.

King's Bench in full force and effect, more fully appeared. Averment, that the manors of H. & T. with the appurtenances, the tithes, rectory, &c., in the declaration mentioned, were respectively the same with the manors, tithes, rectories, &c., mentioned in the said recovery, record, and proceedings, and not other or different. Prayer of judgment if defendant *during the said terms in the said record mentioned*, ought to be admitted to the said plea, contrary to the said recovery, record, and proceedings.

Replication to the second and third pleas, that defendant ought not to be admitted to plead the said pleas or either of them, because, &c., (stating the action of ejectment on two demises, the pleadings, verdict, and recovery exactly as on the replication to the first plea, with a similar averment of identity, and conclusion.)

Rejoinder to the replication to the first plea; that the defendant ought to be admitted to plead the said plea, because heretofore, to wit, on 2d November, 1836, a writ of error was duly issued out of Chancery by defendant, to remove a transcript of the record and proceedings in the ejectment suit, mentioned in the replication, into the Exchequer chamber. That the said writ of error was duly allowed on 2d November, and was a supersedeas to all writs of execution upon the said judgment; and that no writ of execution ever issued at any time upon the said judgment, nor was the said John Doe ever in possession of the premises in the said declaration and replication mentioned, or any of them, or any part thereof. That the said record and proceedings were afterwards duly certified by the Chief Justice in a transcript annexed to the writ of error, and delivered to the justices and barons in the Exchequer Chamber; which said writ of error, at the commencement of this suit, was in the said Exchequer Chamber duly deposited with, and in the hands of, the proper officer in that behalf, and in full force and effect, and the proceedings thereon pending and undetermined; and that, *after* the commencement of this suit, to wit, on, &c., the said judgment was affirmed; and thereupon, to wit, on, &c., a writ of error was duly issued out of Chancery, reciting the said affirmance of the said judgment, and commanding the chief justice of the King's Bench to send the record and process of the said plaint into parliament, &c.; that the last mentioned writ of error was afterwards duly allowed, and was a supersedeas to all writs of execution. That the record and process was afterwards, to wit, on, &c., duly certified, together with the said writ, to the queen (after the demise of the late king) in Parliament; as by the same, in the hands of the proper officer of Parliament in that behalf, reference being had thereunto, will fully and at large appear; and which said last mentioned writ of error is now in full force and effect, and the proceedings thereon pending and undetermined. Verification and prayer of judgment that defendant ought to be admitted to plead, &c.

Similar rejoinders to the replications to the second and third pleas.

General demurrers to each of the rejoinders; and joinder in demurrer.

At the sittings in banc, in last Hilary vacation, (a) 1st February, the demurrers were argued by

Cresswell, for the plaintiff. The questions raised upon the record are, whether the recovery in ejectment be pleadable as an estoppel, in reply to the pleas of *liberum tenementum*, and "not possessed:"

(a) Before Lord Denman, C. J., Littledale, Williams, and Coleridge. J.

whether the effect of the estoppel is defeated by the pendency of a writ of error: and, whether the plaintiff must have been put into actual possession by entry, or writ of habere facias possessionem, before he can maintain an action for mesne profits.

The replication is supported by an authority expressly in point, *Nares v. Lewis*, of which the record is found in Brownlow's Entries, tit. *Trespass*, (b) and in the Appendix to Richardson's Practice of the Common Pleas, vol. ii. p. 256, (4th ed. p. 440.) The original record has been examined and found to correspond with the entries. It was an action of trespass against Elizabeth Lewis, for mesne profits, from 2d October, 32 Car. 2, to 4th March, 35 Car. 2. The defendant pleaded that she entered by command of persons who were seised in fee of the premises, and gave express colour to the plaintiff. The plaintiff replied, by way of estoppel, that he had, in Hil. 32 & 33 Car. 2, brought an action of ejectione firmæ against the defendant and others on a demise to him of the same premises by B. G., for the term of five years on 1st of October, 32 Car. 2; that defendants had pleaded Not guilty, on which issue was joined, which was found for the plaintiff, who thereupon had judgment to recover possession of his term. To this replication the defendant demurred. Judgment was given in the Common Pleas for the plaintiff; and the judgment was afterwards affirmed on error in this Court. The only difference between the two cases is, that the defendant there gave express colour; here the possession is traversed in one plea, and *implied* colour is given by the other plea of liberum tenementum. The law of estoppel is clearly stated in the judgment of Lord ELLENBOROUGH, in *Outram v. Morewood*, 3 East, 346: (a) "a recovery in any one suit, upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title;" and "a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession." His lordship then cites a case from Leonard, *Anon.* 3 Leon. 194, where the defendant, in an action of trespass quare clausum fregit, pleaded a former recovery in an ejectione firmæ brought by himself against the plaintiff for the same land, and the plea was held to be an estoppel, for that the possession was bound by the recovery. So here the right of possession has been determined between these parties, and the defendant can no longer dispute it by either of his pleas. *Trevivan v. Lawrance*, 1 Salk. 276, also illustrates the law of estoppel, and explains some apparently discordant authorities by showing under what circumstances the jury are bound by an estoppel.

Then, does the pendency of a writ of error alter the case? Until actual reversal, the judgment is in full force, and the replication is strictly true in every part. If it be reversed, the plea of course becomes false, and the estoppel fails; but in the mean time the possibility of reversal cannot affect the present validity of the judgment. Thus, debt lies on a judgment pending a writ of error brought upon the same judgment; Year-Book, 18 Ed. 4, f. 6, B., pl. 33; *Dighton v. Granvil*, 4 Mod. 247. It was said in the latter case that a writ of error is not pleadable, even in abatement, to a scire facias upon a judgment. If, then, it will not

(b) Brownlow Latin Redivivus, p. 493, (ed. 1693.)

(a) See p. 354.

suspend the effect of a judgment, à fortiori it is no bar to it. The same point was decided in *Snook v. Mattock*, 5 A. & E. 239, (31 E. C. L. R. 327,) and *Godwin v. Goodwin*, 20 Vin. Abr. 69; *Supersedeas*, (B.), pl. 12. In *Donford v. Ellys*, 12 Mod. 138; S. C. as *Tonford v. —*, Comb. 455, the Court refused to stay proceedings in an action for mesne profits, pending error in the action of ejectment; and rightly, for the plaintiff's remedy should not be put in peril by the contingency of the death of parties, or of witnesses, or other accidents which may occur during the delay. It is true that the writ of error is a supersedeas of execution; but that is only by the practice of the Courts, and not by any rule of law; for the Courts will sometimes permit execution to be issued, as where the writ of error appears to be brought for delay; *Kempland v. Macauley*, 4 T. R. 436. *Meriton v. Stevens*, Willes, 271, and *Taswell v. Stone*, 4 Burr. 2454, also show that this practice is founded on the equity of the Court. Nor will any inconvenience follow from the reversal of the judgment in ejectment, for the defendant may be relieved, either by applying to this Court to stay execution, or by a writ of *audita querelâ*.

The objection that the plaintiff has not obtained actual possession, or sued out a writ of *habere facias possessionem*, is entitled to no weight; for the plaintiff in ejectment may have a right to the profits without the possession. If the plaintiff had been tenant per autre vie, and the life had dropped, he could not have obtained possession, but would have had a right to the mesne profits. In the old action of *ejectione firmæ*, where the plaintiff sued for his term and damages, he might have damages without the term: 7 Ed. 4, 6, (a) cited Bro. Ab. *Quare ejecit infra terminum*, &c., pl. 6; *Peto v. Checy*, 2 Brownl. & G. 128. So, in the modern action of ejectment, when the term expires, the plaintiff may have damages without possession; *Thrustout dem. Turner v. Grey*, 2 Stra. 1056; *Doe dem. Morgan v. Bluck*, 3 Camp. 447. So, in the analogous case of a writ of waste, the plaintiff may be entitled to damages, where he cannot have the place wasted; Co. Lit. 285 a.

Wightman, contra. The replication is no estoppel. It is no answer to the first plea denying the plaintiff's possession, because the recovery and judgment in ejectment did not vest the possession in the plaintiff, but only entitled him to obtain it by a writ of possession, which was never sued out. The rejoinder distinctly states that no execution ever issued, and that the plaintiff never was in possession of the premises. The consent rule no doubt confessed the possession, but that is no part of the record. If, then, the plaintiff has not been in actual possession since the recovery in ejectment, this action, which is founded on possession, will not lie. It would, indeed, have been enough, if the plaintiff had been let into possession voluntarily by the defendant; *Culvert v. Horsfull*, 4 Esp. 167; but possession is at all events essential. *Fenwick v. Grosvenor*, 1 Salk. 258, illustrates the principle. *Doe v. Huddart*, 2 C. M. & R. 316, only decides that the record of a recovery in ejectment is not conclusive evidence of title in an action for mesne profits; though it was certainly intimated by the Court that, if it be available at all by way of estoppel, it must be specially replied.

Then, as to the plea of *liberum tenementum*, there is this additional difficulty, that the plaintiff sets up his judgment to recover a term as an answer to a claim of the freehold. The plea and the replication are

(a) See *Doe dem. Poole v. Errington*, 1 A. & E. 750, (28 E. C. L. R. 197;) p. 756, and note (a.) *ibid*.

therefore not *ad idem*. The defendant may be estopped from denying that the plaintiff is entitled to a term; but a term or lease to the plaintiff, though pleadable in reply by way of confession and avoidance of a claim of freehold, cannot *estop* the defendant from asserting such claim. [LITLEDAL, J. The term is not derived from the defendant, but a third party, whose title has been established as against the defendant.] It does not appear whether the title of both the lessor and the plaintiff may not have been derived from the defendant; but, at all events, the plaintiff established nothing but a right to recover a term, which is consistent with the title pleaded by the defendant. *Taylor dem. Alkyns v. Horde*, 1 Burr. 60, 114, settles the principle of the modern action of ejectment, and shows that the judgment is "a recovery of the possession, (not of the seisin or freehold,) without prejudice to the right, as it may afterwards appear, even between the parties." He who enters under it can only be possessed "according to the right," *Id.* p. 144. A judgment in ejectment cannot be pleaded at all, in any shape, either by the defendant or the plaintiff, in a second action of ejectment for the same land. It is not even evidence in a second action. If, indeed, a plea of *liberum tenementum* had been pleaded to the action of ejectment, and the issue on it found for the plaintiff, he might then have replied it by way of estoppel in this action. [COLERIDGE, J. The verdict and judgment show a right of possession in the plaintiff: the plea of *liberum tenementum* asserts a right of possession in the defendant: has not the plaintiff a right to say, "this question has already been settled between us in the former action?"] The estoppel must be of something directly in issue. Here the right to the freehold is alleged. In ejectment, the right to the possession alone was determined. The precedent cited from Richardson's Practice is unsatisfactory, because no grounds of the judgment appear in any report of the case; nor are the pleadings exactly the same, for the plea there states a seisin in fee, and an actual possession of the persons so seised, by entry. The issue, therefore, went to the possession.

There are further objections to the replication. The declaration complains of an expulsion, and appropriation of the mesne profits from 10th July, 1826, down to the commencement of the suit. The replication alleges a recovery on two demises, one on 10th July, 1826, for fourteen years, the other on 26th December, 1831, for seven years. In this there is repugnancy as well as uncertainty. The recovery of the last term of seven years only shows a possession or right of possession on 26th December, 1831, and is therefore no answer to so much of the pleas as denies possession, or right of possession, during the period between that time and July, 1826. [COLERIDGE, J. The judgment is for recovery on both terms.] Estoppels are to be construed strictly; and the plaintiff ought to show on which of the terms he relies. Besides, in point of form, although the premises, included in the two demises, are the same in name, viz., the manors of H. & T., yet they are alleged in the declaration in ejectment to be "other" manors and premises. It is, therefore, not clear that the replications cover the whole period to which the pleas apply. The pleas apply to the period between July, 1826, and the commencement of this suit. The recovery in ejectment, without actual entry, at most only estops the defendant from denying possession for the period mentioned in the declaration in ejectment, and the replication is, therefore, not co-extensive with the first plea. That declara-

tion asserts a possession under the first demise from 1826 till ouster in 1831, which is inconsistent with the continued expulsion of the plaintiff from 1826, as alleged in the present action.

Supposing, however, that the replication is good, the pendency of a writ of error is an answer to it. It would, indeed, be a singular state of the law, if a judgment should be held conclusive, the validity of which is actually in question in a Court of Error. The effect of the rejoinder is, not to deny the existence of the judgment, but to stay its operation during the pendency of the writ of error. Any averment may be made in answer to an estoppel, which does not impugn the record, and which only goes to the operation of it; *Hynde's Case*, 4 Rep. 71 b, cited 10 Vin. 721, *Estoppel*, (A) 12. That the Court may interfere in a summary manner, is no reason why the defendant should not also avail himself of the same matter by plea; and convenience is in favour of the practice. The case chiefly relied on is *Dighton v. Granvil*, 4 Mod. 247, which is not reported with sufficient clearness to be entitled to much weight. Some of the reasoning, attributed to the Court in it, is at variance with the judgment stated to have been given; and the decision seems to have gone on technical grounds. [LITTLEDALE, J., referred to Com. Dig. *Pleader*, (2 W. 36.)] One distinction between this and the cases cited on the other side is that, at common law, there was no remedy to recover on a judgment after a year and a day, except by action; so that, if the defendant could delay execution by a writ of error for more than a year, he might defeat the judgment altogether. A judgment, until affirmed, ought to be no estoppel, on the same principle that a verdict, until judgment, is inadmissible as evidence; B. N. P. 234. Pendency of error is often pleadable. Thus bail cannot be fixed, pending error; and they may plead it in bar of a scire facias on the recognisance; *Sampson v. Brown*, 2 East, 439. The sheriff, who executes a fi. fa. after notice of allowance, is liable in trespass, and the writ of error may be replied to a justification under such fi. fa.; *Belshaw v. Marshall*, 4 B. & Ad. 336, (24 E. C. L. R. 68.) In *Rowley v. Raphson*, Skin. 590, (a) a writ of error was considered pleadable in bar of execution on a scire facias. In *Curling v. Innes*, 2 H. Bl. 372, the surety of a judgment debtor was allowed to plead the pendency of a writ of error on the original judgment. The hardship on the defendant will be very great, if the rejoinder is disallowed; for there will be no effective remedy by *audita querela*, if the judgment should be reversed; and the plaintiff is an ideal person, by whom the defendant cannot be reimbursed, and who can give no security for costs.

Cresswell, in reply. If the possibility of reversal were to be admitted as an objection to using the judgment, it would be no estoppel, even though there were, in fact, no writ of error pending at all. In *Belshaw v. Marshall* the writ of error was well pleaded; for the writ of execution was superseded by it without reference to the validity of the judgment, and the plaintiff had no other remedy. *Curling v. Innes* only shows that a surety is not damnified so long as the judgment remains unexecuted. *Reynolds v. Beerling*, in the note to *Evans v. Prosser*, 3 T. R. 188, is an authority to show that a judgment is available as a set-off, after error brought upon it. The passage alluded to in *Hynde's Case*, 4 Rep. 71 b, only means that the operation of an estoppel may be defeated by showing that the judgment is

(a) See observations on this case in *Snook v. Mattock*, 5 A. & E. 239.

reversed, or that the parties are not the same. If the judgment should be reversed, an *audita querela*, which is an equitable, remedial writ, will afford a complete remedy, as well between parties to the record as others who are interested in it: note (1) to *Turner v. Davies*, 2 Wms. Saund. 148.

As to the necessity of entry or execution by *habere facias possessionem*, the plea of Not guilty either denies or admits the entry alleged in the declaration. If it denies it, the verdict falsifies the plea and estops the defendant; and in either case, the entry and possession are established as against him. The possession and ouster, alleged in this action, are the same as those stated in the action of ejectment, and neither are now to be disputed. *Nares v. Lewis*, 2 Richardson's P. C. P. 256, (4th ed. p. 440,) is distinguished from this case only by the statement of a seisin in fee with express colour. The pleas of *liberum tenementum* and seisin in fee are put on the same footing in *Leyfield's Case*, 10 Rep. 89; and neither of them requires express colour, because they are not inconsistent with a possession by the plaintiff: *Taylor v. Eastwood*, 1 East, 212. The plea of *liberum tenementum* admits an actual, but not a rightful possession in the plaintiff, and asserts a right of possession in the defendant. The judgment in ejectment shows a rightful possession in the plaintiff, and is therefore inconsistent with, and an answer to the plea. That *liberum tenementum* denies a rightful possession, is clear from the practice, before the late rules of pleading, of giving it in evidence under Not guilty. That the judgment in ejectment implies a rightful possession, and that ejectment is, in this respect, distinguishable from trespass, is shown by *Graham v. Peat*, 1 East, 244. [Lord DENMAN, C. J. A judgment is no bar to any number of other ejectments by the same party for the same premises.] That peculiarity in ejectment arises from the facility of varying the title of the plaintiff by alleging a different demise, or a demise on a different day, so that the title may be always made to appear different. But, if the second declaration exactly resembled the first, the judgment would then be pleadable. If the declaration in this case had stated the recovery in ejectment, then the pleas of *liberum tenementum*, or of Not possessed, would have been demurrable; *Kemp v. Goodall*, 1 Salk. 277; *Palmer v. Ekins*, 2 Stra. 817.

With respect to the argument that the replication does not answer the whole of the plea, it is enough to say that the plea does not answer the whole of the declaration. If the defendant is estopped as to any part, he has no right to apply his plea to the whole. The judgment is inconsistent with his plea as to part, and the whole plea is, therefore, shown by the replication to be bad. Until the new rules of pleading, the practice was to plead Not guilty, and the judgment was then conclusive evidence of the plaintiff's title. Since the new rules, pleas, which distinctly challenge the plaintiff's title, are put on the record; and it has, therefore, become necessary to reply the estoppel. The rule laid down in the *Duchess of Kingston's Case*, 20 How Sta. Tri. 538, note, is not at variance with the later decisions in *Vooght v. Winch*, 2 B & Ald. 662; *Magrath v. Hardy*, 4 New Ca. 782, and *Doe v. Huddart*, 2 C. M. & R. 316. They are reconciled by holding a judgment to be conclusive as evidence, where the party, who relies on it, has no opportunity of pleading it; and inconclusive, where the party

elects to refer the fact to the jury, when he might have pleaded the estoppel. (a)

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.

This was an action for mesne profits; the declaration of the 13th of June, 1837, was in the common form; it laid an entry on the manors of Hornby and Tatham, and other premises, and expulsion on the 10th July, 1826; the latter continued to the commencement of the action. Several pleas were pleaded; two only it will now be necessary to consider: The first denied the plaintiff's possession; The other pleaded *liberum tenementum* of the defendant during all the time in the declaration mentioned. To each of these pleas the plaintiff, by way of estoppel, replied the proceedings in an action of ejectment brought by the plaintiff on the demise of Sandford Tatham against the defendant. Two demises were laid, on the 10th July, 1826, for fourteen years, and on the 26th December, 1831, for seven years, with a single ouster on the 27th December, 1831. The plea of Not guilty, the verdict, and the recovery, by judgment, of the two terms, were then stated, with an allegation that the judgment was still in full force; and the replications, having alleged the identity of the premises so recovered with those mentioned in this declaration, conclude with praying judgment, "if the defendant, during the said terms in the said record mentioned, ought to be admitted to the said plea, contrary to the said recovery, record, and proceedings."

The validity of this replication of estoppel was questioned, independently of the rejoinder, and may be conveniently disposed of first. With regard to both pleas, that which denied the plaintiff's possession and that which asserted the defendant's freehold, the question will be, whether it discloses that those pleas seek to draw again into controversy the very point (or right) decided in the former suit. If they do, upon the plainest principles, it concludes the defendant from pleading them. And this principle was not denied in the able argument for the defendant, but only its application to the present record.

1st. As to the plea which denied the plaintiff's possession. Two terms, it was said, are shown to have been recovered in the ejectment; one commencing 10th July, 1826, for fourteen years; and one on 26th December, 1831, for seven years. The ouster is laid on the 27th December, 1831, and no possession appears to have been given under the judgment. But the judgment itself in ejectment does not give the possession; only the right to it by entry, or writ of *habere facias possessionem*. The plea, therefore, and the replication, are not inconsistent and it appears by the whole record that the plaintiff has not, in fact, the possession.

This reasoning, we think, is not sound. The plea, being pleaded to the whole declaration, must be taken, on the assumption of its being a good plea, to deny any such possession in the plaintiff as was necessary for his bringing the action at all. But, in order to bring the action, all that could be necessary, on the strictest construction, would be a possession when the alleged trespass was committed. That, therefore, at least, must be taken to be denied by the plea. But the record in ejectment shows, conclusively as between these parties, a lease of the 10th June, 1826, and a continuing possession till the ouster in December

(a) See *Coles v. The Bank of England*, ante, p. 437. 447.

1831. The plea, therefore, and the replication, are clearly inconsistent, and the former seeks to re-agitate that very question which the latter shows to have been determined in the former action. The defendant's argument, indeed, proceeded on the assumption that it was necessary for the plaintiff to have actual possession at the time of bringing *this action*. And there are, no doubt, old authorities, not cited in the argument, which show that the disseisee could not bring trespass with a continuando after the disseisin before re-entry, because the freehold was in the disseisor for the whole time after the disseisin; but that, after re-entry, he should have trespass with a continuando from the disseisin to the re-entry: but the same authorities state that for the *first* trespass and disseisin the action lay before re-entry, and they give several instances where the disseisee had lost his re-entry by the act of God or the determination of his estate, in which he had the action without re-entry. See Co. Litt. 257 a, and 2 Roll. Ab. 550, 553, 554. It seems to us, however, not important now to follow out this inquiry, because the question is, not to what extent the plaintiff can recover damages on this record, as to which we say nothing, but whether the plea of "not possessed" must not, at all events, include the time at which the trespass charged was committed. We think it must, and, therefore, being inconsistent, to that extent at least, with the judgment set out in the replication, the defendant is estopped from pleading it.

It was urged, indeed, that, viewing the replication in this way, it was open to another objection; that it did not extend so widely as the plea; because, although the plea might refer to the time of the cause of action accruing, it also refers to the time of the commencement of the action; and, as to this last, the replication, showing no re-entry, was no estoppel. But we think this objection received a sufficient answer at the bar. The plea is pleaded to the whole, and it is enough for the plaintiff to show that it cannot be pleadable to that. The first plea, therefore, seems to us to be sufficiently answered.

2dly. In support of the second plea it was said that there was nothing inconsistent in the allegation of the freehold being in the defendant with the recovery of a term for years by the plaintiff; for it may be, for example, that both the plaintiff and his lessor are termors under the defendant.

In order to estimate the weight of this argument, it is necessary to settle what is the true meaning of *liberum tenementum*; what it admits; and what it denies.

Now, as it is pleaded in answer to a possessory action, it must admit a possession in the plaintiff, or it would be bad, as amounting to the general issue. It must admit such a possession as would suffice to maintain the action if unanswered, or as against a wrongdoer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action. In the language of pleading, it gives implied colour to the plaintiff, but asserts a freehold in the defendant with a right to immediate possession. In an ordinary case, therefore, such a plea is answered by replying a term of years in the plaintiff created by the defendant, which shows that the plaintiff's possession is not merely colourable, but rightful; or, where the declaration has been sufficiently explicit, by taking issue on the *liberum tenementum*, and so showing the defendant to be a wrongdoer.

Now, in the present case, the replication shows that, as between these

parties, it has been decided that the plaintiff is a termor, not indeec under the defendant, but under one whose title is paramount to his; that the possession therefore is a rightful one, and that the defendant has no right to immediate possession: but this is inconsistent with the limited admission of the plea and the title set up by it, taken together. And therefore we think the defendant was estopped from such plea.

Mr. *Cresswell* cited, in support of the replications to both pleas, the case of *Nares v. Lewis*, which is to be found in 2 Richardson's Practice, 256, (4th ed. p. 440;) and Brownlow's Entries, 493; and he has procured us a transcript of the whole record from the treasury, the judgment not appearing in Brownlow. The declaration was in trespass, and for the mesne profits. The plea set out a title in the defendant in fee, giving express colour to the plaintiff. The plaintiff replied, by way of estoppel, the proceedings in a former action of ejectione firmæ against the defendant and others, in which judgment had passed for him to recover his term in the same premises; but, as in the present case, the replication said nothing of any re-entry, or delivery of possession. The rejoinder maintained the title in the plea, to which there was a general demurrer, and after several continuances it appears that judgment passed for the plaintiff. Substituting a freehold for a fee simple, this case is precisely the same as the present, as far as regards the point already considered, and is an authority in support of our opinion.

The replications being good by way of estoppel, the remaining question is, whether the rejoinders avail to destroy their effect; and these allege the pendency of a writ of error on the original judgment in the House of Lords; and we are clearly of opinion against the defendant on this point. The authority cited by Mr. *Cresswell*, from the Year-Book, 18 Ed. 4, f. 6 B, pl. 33, is very direct and satisfactory; and to this, and other cases cited at the bar, may be added those of *Taswell v. Stone*, 4 Burr. 2455; and *Benwell v. Black*, 3 T. R. 643, because they illustrate the distinction taken between the mere maintenance of the action on a judgment, pending a writ of error to reverse it, and the proceeding to execution upon a judgment recovered in such second action; in the former case, the Court being clear that there was no reason to set aside the judgment, but thinking it highly proper to stay any proceeding to execution upon it.

Upon the whole, therefore, we give judgment for the plaintiff.

S.

Judgment for the plaintiff.

UTHER against RICH.—p. 784.

To *assumpsit* on a bill of exchange, drawn by defendant, endorsed by him to H., and by H. to plaintiff, defendant pleaded that he endorsed in blank, and never delivered the bill to H., but delivered it to L., who, till H. became possessed, held it for the sole use of defendant, and for the specific purpose that he, L., should get it discounted for, and pay the proceeds to defendant; that L. fraudulently and covinously, in violation of good faith, and contrary to the said purpose, delivered the bill to H., and H. took it, without discounting for defendant, contrary to the said purpose, and in breach and violation thereof, to wit, for the purpose and under colour and pretence of securing an alleged debt from L. to H.; that H. was not a bona fide holder for value or consideration, and that plaintiff was not at any time a bona fide holder for value or consideration; and that defendant never had received consideration or value from L., or H., or plaintiff, or any other, for the endorsing or payment of the bill. Replication, *de injuria*.

Held, that, on this issue, the question as to plaintiff was, whether he gave any value for the bill,

and that, if he did, he was entitled to the verdict, though the circumstances of the fraud alleged might in other respects be true, and the plaintiff privy to them; for that the denial of his being a bona fide holder for value, as here worded, did not raise the question of his privity to the fraud.

ASSUMPSIT on a bill of exchange, dated 27th September, 1836, for 300*l.*, at twelve months after date, drawn by defendant on Lord Arthur Chichester, payable to order, and endorsed by defendant to John Hunter and by John Hunter to plaintiff: averment that the drawee did not pay at maturity, and that defendant had notice. Breach, non-payment by defendant.

Second plea: That the endorsement of the said bill in the declaration mentioned, by defendant, was an endorsement in blank, and that defendant never delivered the bill to Hunter, but that he delivered the same to one Lewis Levy, and the said Lewis Levy then received, and, from thence until Hunter, as hereinafter mentioned, first became possessed thereof, held the same for a specific purpose, for the sole use and benefit of defendant, and not otherwise, to wit, for the purpose and in order that Levy might get the bill discounted for defendant, and deliver and pay the proceeds thereof upon such discounting to defendant. Averment that Levy, fraudulently and covinously, in violation of good faith, and contrary to the said purpose for which he received the said bill, afterwards, to wit, on, &c., deliver the bill to Hunter, and Hunter then took and received the same from Levy, upon other and different terms, and without discounting the same for defendant, and contrary to the said special purpose, and in breach and violation thereof, to wit, for the purpose, and under colour and pretence of securing a certain debt then alleged to be due from Levy to Hunter. That "Hunter was not at any time a bona fide holder of the said bill of exchange for value or consideration in that behalf given, and also that the plaintiff was not at any time, nor now is, a bona fide holder of the said bill of exchange for value or consideration in that behalf given;" that defendant never hath received any consideration or value whatsoever from Levy or Hunter, or plaintiff, or from any other person whatsoever, for the endorsing or for the payment of the bill by him, the defendant. Verification.

Replication, De injuriâ, and issue thereon.

There were other issues of fact.

On the trial before Lord DENMAN, C. J., at the Middlesex sittings after Hilary term, 1837, it appeared that Levy, mentioned in the plea, was introduced to the drawer (defendant) and the drawee, as a person who could raise money for them, and it was agreed that defendant should draw upon the drawee, and endorse, and the drawee should accept, bills to the amount of 1800*l.*, which Levy should get discounted. The bills, including that on which the present action was brought, were drawn, endorsed, and accepted accordingly, and handed to Levy; but neither the drawer nor drawee received any money for them; and Levy afterwards returned several of the bills. Levy handed the bill now sued upon to Hunter, receiving for it from him 75*l.* in cash, and two acceptances for 25*l.* each. Hunter endorsed the bill to the plaintiff, a gunsmith, from whom he received guns for it, said to have been estimated, between them, at 150*l.*, and an acceptance for 150*l.* which was afterwards paid. Hunter afterwards sold the guns for 50*l.* to a pawnbroker. Upon this and other evidence, the defendant's counsel contended that

the plaintiff was privy to a fraud on the drawer and drawee, and therefore was not a bonâ fide holder for value; but the lord chief justice told the jury that, upon the issue on the second plea, their verdict must be for the plaintiff, if they believed that he had really given any value for the bill. Verdict for the plaintiff on all the issues.

In Easter term, 1837, Sir *W. W. Follett* obtained a rule for a new trial, on the ground of misdirection as to the issue on the second plea, and of the verdict being against evidence on one of the other issues. In Michaelmas term last, (a)

Platt and *Knowles* showed cause. It is not disputed that Hunter gave some value to Levy for the bill; and, therefore, unless the issue upon the second plea raise the question of fraud, it must be found for the plaintiff. The question might have been raised, but is not. It will be said that the words "bonâ fide" were put in issue the honesty of the transaction; but the allegation in the plea is, that the plaintiff was not a bonâ fide holder for value. Now it is true that, at one time, the principle was adopted that a party taking a bill is bound to use due diligence in inquiring whether the party giving it has come by it fairly; *Gill v. Cubitt*, 3 B. & C. 466, (10 E. C. L. R. 154;); *Down v. Halling*, 4 B. & C. 330, (10 E. C. L. R. 347;); *Beckwith v. Corral*, 3 Bing. 444, (13 E. C. L. R. 44.) But those cases are now overruled; *Goodman v. Harvey*, 4 A. & E. 870, (31 E. C. L. R. 212.) Illegality or fraud, since the new pleading rules, must be distinctly put on the record, that the plaintiff may know specifically what is charged, and may answer the allegation in terms. That a party was not bonâ fide holder for consideration may be evidence of fraud: but it is not in itself fraud; just as "gross negligence may be evidence of mala fides, but is not the same thing;" per Lord DENMAN, C. J., in *Goodman v. Harvey*. Fraud, therefore, is not here averred. In *Bramah v. Roberts*, 1 New Ca. 469, (27 E. C. L. R. 460,) it was held that, where a plea alleged that the holder knew a bill to have been fraudulently negotiated and no value given for it, the holder might reply generally that he had no knowledge of the fraud, and that the bill was endorsed to him for a valuable consideration. That case shows the proper way of raising and meeting the defence. There the language of the replication (independently of the denial of notice) was that the "bill was endorsed and delivered to the plaintiffs fairly and bonâ fide, and for a good and valuable consideration; and this averment TINDAL, C. J., treats (p. 478) as simply an allegation that there was good consideration for the endorsement. The defendant here, on the second issue, might have shown that the consideration was merely colourable, as in *Devas v. Venables*, 3 New Ca. 400, (32 E. C. L. R. 176:); but he could not go into any other question of fraud.

Sir *W. W. Follett* and *W. H. Watson*, contra. If the plea does not raise the question of fraud with sufficient distinctness, there should have been a special demurrer. [PATTESON, J. The question is, whether the allegation that the plaintiff was not a bonâ fide holder for value is an allegation of fraud on the part of the plaintiff: if it be, evidence of the fraud was receivable: if it be not, no demurrer was necessary, the plea presenting only a denial of the consideration.] The words "bonâ fide" mean *in the fair and ordinary course of business*; if a value be given

(a) Monday and Tuesday, November 19th and 20th, 1838. Before Lord Denman, C J Patteson, Williams, and Coleridge, Js.

in bad faith, the party does not become a *bonâ fide* holder for value. Before the new pleading rules, privity to the fraud would have been a good defence under non assumpsit, whether value was given or not. *Gill v. Cubitt*, and similar cases went too far, because there more than bona fides was required, namely, reasonable diligence. In Bayley on Bills, p. 471, (5th ed.,) it is said, "In many cases the plaintiff is compellable to prove that either he or some preceding party took the bill or note *bonâ fide*, and for value; As, in case of a bill or note originally given without consideration, and whilst the person giving it was under duress: Or in case of a bill or note obtained by fraud: Or in case of a transfer by delivery by a person not entitled to make it: As, in the instance of bills or notes which have been stolen or lost." BAYLEY, J., in *Gill v. Cubitt*, adopts the criterion of LORD MANSFIELD in *Miller v. Race*, 1 Burr. 452, (see p. 458:) "Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, 'that he took it for a full and valuable consideration, in the usual course of business.' Indeed, if there had been any collusion, or any circumstances of unfair dealing; the case had been much otherwise." That suggests the true question, and shows what "*bonâ fide*" means in cases of this kind. Here the jury ought to have been left to find the "collusion," if they thought the facts warranted it. So far, the doctrine laid down in *Gill v. Cubitt* has never been overruled. In *Lawson v. Weston*, 4 Esp. 56, there was no collusion set up; there can be no doubt that LORD KENYON would have considered that a defence. LORD TENTERDEN may, in *Gill v. Cubitt*, have gone too far in overruling that case; but it is consistent with the doctrine for which the plaintiff here contends. In *Backhouse v. Harrison*, 5 B. & Ad. 1098, (27 E. C. L. R. 276,) PATTESON, J. distinctly adhered to the old law on this point: and it was not impeached in *Crook v. Jadis*, 5 B. & Ad. 909, (27 E. C. L. R. 234,) or *Goodman v. Harvey*. As to the onus of proof, it is thrown on the plaintiff if the defendant has shown some fraud or some defect of that nature in the plaintiff's title; *Mills v. Barber*, 1 Mee. & W. 425; S. C. Tyrw. & Gr. 835. The words "*bonâ fide*" have been used by the legislature; and in *Devas v. Venables* it was held that the words "payments really and *bonâ fide* made," in sect. 82 of the Bankrupt Act, 6 G. 4, c. 16, "imported something different from and additional to an actual payment; that the words *bonâ fide* were inserted by the legislature to raise the question, whether the money has been paid honestly and fairly in the course of an honest transaction, and that that question ought not to be left out of the consideration of the jury." This agrees with LORD TENTERDEN's view in *Ward v. Clarke*, Moo. & M. 497, (22 E. C. L. R. 369.)

(The question as to the effect of evidence was also argued; and the Court held that there must be a new trial on this point. See the judgment, post.)

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.

This was an action by the endorsee against the drawer of a bill of exchange. The second plea stated that the bill had been drawn and endorsed to Levy for a special purpose, who, in fraud of that purpose, had handed it to Hunter, and that Hunter handed it to the plaintiff, *not for good and valuable consideration, and that the plaintiff was*

not the bonâ fide holder. The replication was *de injuriâ*. At the trial, I held that these pleadings put in issue nothing but the fact of a consideration having been given, and that the defendant was not at liberty to show that the plaintiff knew of the fraud, but should have pleaded that knowledge in distinct terms.

On the motion for a new trial, other points were disposed of; and the only question now remaining is, what meaning is to be given to the words in the plea, that the plaintiff was not the *bonâ fide* holder of the bill.

With respect to the doctrine laid down in *Gill v. Cubitt*, 3 B. & C. 466, (10 E. C. L. R. 144,) and other cases, we adhere to the more recent decisions, and to what is said in *Goodman v. Harvey*, 4 A. & E. 870, (31 E. C. L. R. 212,) that gross negligence alone would not be a sufficient answer; that it may be evidence of *mala fides*, but is not the same thing. It follows that, in pleading, *mala fides* must be distinctly alleged; and the sole question is, whether *mala fides* is alleged by the words "that the plaintiff was not the *bonâ fide* holder of the bill." The case of *Devas v. Venables*, 3 New Ca. 400, (32 E. C. L. R. 176,) is not in point; for that was a decision upon the meaning of the words "*bonâ fide*" in a particular act of Parliament, which was construed with reference to the subject-matter and the context. Neither is the case of *Bramah v. Roberts*, 1 New Ca. 469, (27 E. C. L. R. 460,) an express authority, as the decision turned on other words in the plea. And the question does not appear to have arisen in any other case.

Now the words in question must be taken with reference to the other allegations in the same plea; and, being so taken, their proper meaning would seem to be, that the plaintiff was merely a collusive holder, not really interested in the bill himself, but only lending his name to Hunter; and then they do not go beyond the allegation that he had not given good and valuable consideration, evidence of which was admitted. But it is contended that their meaning is, that the plaintiff took the bill under such circumstances that he must be considered to have known of the fraud set forth in the plea. We do not see how such a meaning can fairly be attributed to them; and are of opinion that the only proper mode of implicating the plaintiff in the alleged fraud by pleading, is to aver *that he had notice of it*, leaving the circumstances by which that notice is to be proved, directly or indirectly, to be established in evidence: and we cannot treat the allegation, that the plaintiff was not *bonâ fide* holder, as equivalent to such an averment.

It is not necessary to give an opinion on any supposition that the words could be taken without reference to the other allegations in the plea; but we wish it to be understood that we by no means intend to say that, even if taken simply, they would have any other meaning than that which we have now given to them.

The rule for a new trial has been already granted on the ground that the verdict was against evidence: but, as the Court think that the direction was quite right, the rule must be upon payment of costs.

Rule absolute for new trial, on payment of costs.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

JOHN FRANCIS, Lord HOWDEN, against Sir JOHN SIMPSON.
Knight, and Others.—p. 793.

An agreement under seal, between plaintiff and defendants, recited: that a company had been formed for making a railway; that defendants were proprietors; that a bill had been introduced into parliament, according to which, the line would pass through plaintiff's estates and near his mansion, and that he was a dissentient and opposed the passing of the bill; that defendants had proposed that, if he would withdraw his opposition, and assent to the railway, they would endeavour to deviate the proposed line: and plaintiff agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent: and defendants covenanted that, in case the then bill should be passed in the then session, they would, in six months after it received the royal assent, pay plaintiff 5000*l.* as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of, and without prejudice to further compensation to plaintiff in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation, for any damage, as in the agreement after mentioned.

Plaintiff declared in debt, and averred that he withdrew his opposition to the bill, which passed into a law in the then session, that six months had since elapsed, but that defendants had not paid the 5000*l.*

Plea, that the railway, at the time of making the agreement, and according to the act, was intended to pass through the lands of divers individuals; that the agreement was made privately and secretly by the parties thereto, without the consent or knowledge of the said individuals, and was concealed from them continually until the act was passed, and was not disclosed to, or known in parliament, and was concealed from the legislature, during the passing of the act; and that plaintiff at the time of passing the act, and still was a peer of parliament. On demurrer,

1. Held, in Q. B., that the plea was good, as showing that the contract was a fraud on the legislature.

Judgment reversed in the Exchequer Chamber, because the record did not distinctly show that the parties, at the time of the contract, meant it to be concealed. *Quære*, whether, if such intention had been shown, the plea would have been good!

Held also, in the Exchequer Chamber,

2. That no fraud on the individual landholders appeared, it not being distinctly shown that concealment from them was intended at the time of the contract. *Semble*, that, even if this had appeared, there was no fraud on the landholders.

3. That the agreement was not bad on the ground of plaintiff being a peer, since it was not shown that the money was promised as a consideration for his vote being given or withheld, and he had a right in his individual character to bargain for compensation for injury to his land. But that, if it had appeared that the money was so promised, the action *must* have failed.

Defendants also pleaded that, after making the agreement and before action brought, the company abandoned the deviated line, and in lieu thereof adopted another line, altogether out of plaintiff's lands; that they had petitioned parliament to be allowed to carry the railway along the new line, and were then making every exertion in their power to procure an act for that purpose; and that, if they should obtain such act, no part of the railway would pass through plaintiff's lands.

4. Held, in Q. B., on demurrer, that the plea was no answer.

DEBT on an agreement under seal between plaintiff and defendants. The agreement as set forth in the declaration and upon oyer, recited the formation of a company for making a projected railway, called "The York and North Midland Railway company;" that defendants were four of the proprietors, and that a bill had been introduced into parliament for making such railway; that the line thereof, according to

such bill and the maps and plans deposited, would pass through the estates and near the mansion of the plaintiff; that plaintiff, considering it would be an injury to his estates, was a dissident from the undertaking, and opposed the passing of the bill; that defendants, in their individual capacities and not merely as proprietors, had proposed that, if plaintiff would withdraw his opposition to the bill and assent to the railway, they would endeavour to deviate the line proposed in the map or plan deposited for the purposes of the said bill, and would endeavour to carry such deviated line in the direction shown upon a map annexed to the agreement, so as to leave the proposed original direction at a certain point, B, and return to it at A; and that, in case the bill then in parliament should pass into law in the then session, defendants should be bound by the further stipulations and agreements in the deed contained. The count further stated, that, on condition of such stipulations and agreements being performed, plaintiff did, by the said deed, withdraw his opposition to the bill and give his assent thereto; and defendants did thereby jointly and severally covenant and agree with plaintiff that they would apply, during the then next session of parliament, for, and endeavour to obtain an act to enable them to deviate their line as proposed; and furthermore, that, in case the present bill then in parliament, should pass into law within the then present session, then defendants, or some or one of them, or their executors, &c., or the said company, should and would, within six calendar months after the act for constructing the railway according to the line proposed in the then present bill, should receive the royal assent, pay to plaintiff the sum of 5000*l.*, as or towards compensation for the damage and detriment which his residence and estates would sustain from the railway passing according to such deviated line, exclusive of, and without prejudice to further compensation to be made to him in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation to him or his tenants for any such damage or injury as thereafter expressed; and, in case the said bill then in parliament should, within the then present session, be passed for making the railway according to the present plan, then defendants, or some or one of them, or the company, should and would, in the then next session, apply and use their best endeavour for obtaining an amended act for deviating the line of the railway; and, in case defendants, &c., could not obtain such amended act during the then next session, by reason of a dissolution or other inevitable obstacle, or, in that case, during the next following session, then defendants, &c., should, within three calendar months after the amended act should have passed in the then next or following session, as the case might be, or, in the event of such act not being obtained, within three calendar months after the attempt to obtain it should have failed, pay to plaintiff, as part of his personal estate, an additional sum above 5000*l.*, to be fixed by certain referees therein named, by way of compensation for damage which plaintiff's residence and estate would sustain by the railway passing otherwise than according to the deviated line, exclusive of, and without prejudice to further compensation to plaintiff and his tenants for any such damage and injury as thereafter expressed. The agreement contained further stipulations to pay the plaintiff 100*l.* per acre used for the purposes of the railway, and to pay to him and his tenants such further compensation, for damage or injury sustained during the progress of the works, as

certain referees should fix. The declaration then averred that plaintiff withdrew his opposition to the bill in pursuance of the agreement, and that the original bill passed into law during the then session of parliament; but that, although upwards of six months had elapsed, defendants had not paid the said sum of 5000*l.*, or any part thereof.

Pleas, (after oyer :) 1. That, after the agreement made, and before suit commenced, to wit, on, &c., the company of proprietors resolved to abandon, and did altogether abandon, the said deviated line, the direction of which is in the said agreement mentioned to be shown upon the map annexed to the said agreement; and, in lieu thereof, did then resolve to adopt, and did then adopt another line for their said projected railway, in lieu of the said deviated line mentioned in the said agreement, and eastward thereof; which said newly adopted line, as being eastward of the said deviated line in the said agreement mentioned, entirely missed and is altogether out of the lands, tenements, and hereditaments of the said plaintiff, and every part thereof; and that the said company, to wit, on, &c., presented a petition to parliament to be permitted to carry the said projected railway along the newly adopted line, and are now making every exertion in their power to procure an act of parliament for carrying the same along the said newly adopted line; and that, if they shall succeed in obtaining the said act, no part of the projected railway will pass through the lands, &c. of the plaintiff, or any part thereof. Verification.

2. That the projected railway, in the agreement mentioned, at the time of making the agreement was intended to pass through, and, according to the act in the declaration mentioned, is intended to pass through, lands of divers individuals; and that the said agreement was made and entered into privately and secretly between the parties thereto, and without the consent or knowledge of the individuals through whose lands the said railway was so intended to pass, and was concealed from them continually until the said act was passed; and that the agreement was not disclosed to, or known in or by, the said parliament in and by which the said act was so passed as aforesaid, and that the same was concealed from the legislature during the passing of the act. And defendants further say that plaintiff, before and at the time of making the agreement, was, and still is, a peer of this realm. (a) Verification.

Demurrer to the first plea, for that it did not appear in or by that plea whether the company abandoned the deviating line therein mentioned before or after the passing of the act of parliament in the agreement and declaration mentioned; and that the money stipulated to be paid by defendants was to be paid at all events within six months after the passing of the act, and that it was no answer, in point of law, that, after the agreement made, and the act passed, the company thought fit to abandon the line. Joinder.

There was also a general demurrer to the second plea, and joinder.

The demurrers were argued in the Court of Queen's Bench in last Michaelmas vacation. (b)

Cresswell, for the plaintiff. As to the first plea, the making of the road is not a condition precedent to the payment of the money. The

(a) It was objected to this plea that it did not allege the plaintiff to be a peer of parliament, but, as the Court expressed an inclination to permit an amendment in this respect, it was agreed at the bar that the argument should proceed as if the necessary amendment had been made.

(b) November 28th, 1838. Before Lord Denman C. J., Patteson, Williams, and Coleridge, J.

consideration for the payment was the plaintiff's consent to the adoption of the original line proposed by the bill. The defendants entered into an absolute engagement to pay the money at a fixed day after the passing of the act; and no alterations in the plans of the defendants or of the company can now relieve them from their obligation. Suppose the defendants had agreed to pay the plaintiff a sum on a certain day in consideration of a grant by the plaintiff to them of a right of way, would it be any defence to an action for the money that the defendants had since released their right to the way? The payment is independent of the actual making of the road; and the case is within the principle of *Portage v. Cole*, 1 Saund. 319, and the law stated, in note (4) to that case, by Mr. Serjt. Williams, 1 Wms. Saund. 320. The plea does not even show that the company have yet obtained the necessary powers for changing the line. [He then proceeded to argue the demurrer to the second plea; but, as the same cases, with some exceptions noticed hereafter, were cited, and the points upon this plea more fully discussed, in error, this part of the argument has been here omitted.]

Sir *F. Pollock*, *contrà*. As to the first plea, the whole agreement has obvious reference to some line that shall pass over the plaintiff's land. The payment is "as or towards compensation for the damage and detriment" which the residence and estates of the plaintiff will "sustain from the railway passing according to such deviated line." The company have wholly abandoned the deviated line, and every other line passing over the plaintiff's property; and an act has since passed to remove it far away from the property. (a) A new state of things has arisen, from which it is clear that the defendants can have no benefit from the agreement, and the plaintiff suffer no detriment to his estate. The case resembles the second class mentioned in note (4) to *Portage v. Cole*, namely, where, though the day of payment is fixed, the consideration fails before the day arrives. If performance fails, or becomes impossible, before the day of payment, as where the consideration is the appointment to an office which is abolished by parliament before the day, no action lies for the money. [The rest of the argument is omitted for the reasons already mentioned.]

Cresswell, in reply, was stopped by the Court, as to the first plea.

Lord DENMAN, C. J. We think there is nothing in the first plea. As to the second plea,

Cur. adv. vult.

Lord DENMAN, C. J., in Hilary term, (January 31st,) 1839, delivered the judgment of the Court.

This case was argued in the sittings after last term upon demurrer to the pleas. [After stating the declaration, his lordship continued as follows.]

To this declaration, after setting the agreement out on oyer, the defendant first pleaded a plea which we thought bad for reasons assigned during the argument.

More difficult and more important questions arise upon the second plea. This plea seeks to avoid the deed on three several grounds. First, that the railway at the time of making the agreement was, and

(a) Stat. 7 W. 4 & 1 Vict. c. lxviii. (local and personal, public.) See post, p. 247, note (b). This act was passed 30th June, 1837; the plea was pleaded, 15th February, 1837. It was noticed by *Cresswell* that the act (sect. 27.) recognised and confirmed the contracts made under the preceding act.

by the bill now passed, is intended to be carried through the lands of divers individuals, and the agreement was entered into secretly, without their knowledge. Secondly, that the agreement was not known to parliament, and was concealed from the legislature during the passing of the act. And, lastly, whatever might be the character of such an agreement, if made between the defendants and any other than a peer or member of the legislature, that the plaintiff's quality as a member of the Upper House, and the duties incumbent on him as such, made it at all events an illegal agreement for him to enter into, and one which he cannot enforce. This plea is demurred to generally; and it was contended, in the argument, that on neither of these grounds could the agreement be impeached. We think that, the plea and agreement being taken together, an answer to the declaration is disclosed, on the ground that the latter had in contemplation that which was inconsistent with material allegations in the preamble and provisoes in the clauses of the intended bill, and that to conceal such an agreement from the legislature was in the eye of the law a fraud upon it, and any contract founded on such concealment contrary to good faith.

Whether an agreement of this sort, apart from the accident of concealment, must be necessarily invalid in itself, we need not decide. A state of things may, perhaps, be easily imagined, in which, from new information, obtained after the first line had been applied for, it would become just, as well as expedient, to substitute another for it. But the question is, whether such a change can lawfully be made during the progress of the bill, by a secret compact between the future company and certain individuals. Now, the line by which a railway is to pass is at the very root of the whole project. Alter that line, fresh notices, fresh plans, fresh consents become necessary. Had the proposed deviation been introduced into this bill, it could not, under ordinary rules, have passed in that session. Suppose, then, that this agreement had been disclosed to parliament, is it clear that the bill would have been allowed in its present state? On the contrary, is it not at least equally probable that some such objection as the following might have prevailed? "You come to us for powers which you do not mean to use; you offer evidence in support of the preamble, and desire us to find it proved, when it is at the same time clear, from your own deliberate agreement, that another line is preferred and intended to be adopted by you; if you are not as yet in a condition to ask us to legislate on that line, it is fitting that we should suspend legislating altogether, until we can have your whole plan before us at once." Now, if it is in any degree reasonable to suppose that the legislature might have proceeded on such grounds as these, we think it clear that the agreement ought to have been disclosed, and that to conceal it was a legal fraud, because it was concealing that which might have made the decision other than it was. Acts of this kind, it is well known, are to be considered as bargains between the public and the parties applying for them, and the legislature represents the public in framing them; it is essential, therefore, that nothing be knowingly kept back which may reasonably be expected to have an influence on the judgment of the legislature in so framing them as to secure for the public the best terms in return for those powers over private property, and other advantages, which the act is to confer on the parties applying. Upon principle, therefore, we are of opinion that this agreement, under the circumstances of concealment disclosed by

the plea, cannot be enforced. But it has been twice under the consideration of a Court of Equity; and two other cases in equity, supposed to bear upon the point, were cited in the argument: it is necessary for us, therefore, to see how the point stands upon authority. The present defendants, it seems, filed their bill, praying, among other things, that this agreement might be declared to be void, and delivered up to be cancelled, and the present plaintiff enjoined from proceeding in this action. The bill was demurred to generally for want of equity: in the argument before Lord LANGDALE, the same three objections to the agreement were insisted on as this plea discloses: the judgment proceeded entirely on the second, the same which we have been considering; and upon that ground Lord LANGDALE said, he saw very strong reasons to think that, when the proper time came for deciding it, the contract might be considered and held to be illegal; he, therefore, overruled the demurrer; *Simpson v. Lord Howden*, 1 Keen, 583. This decision, however, was reversed, on appeal, by the Lord Chancellor, *Simpson v. Lord Howden*, 3 Myl. & Cr. 97, not upon grounds which impeached the reasoning or opinion of the Master of the Rolls, but upon a point which he had disposed of in a very few words, that the objections made to the agreement were all apparent on its face, and available in a Court of Law, and that there was no instance in which a Court of Equity had given relief under such circumstances. Some expressions, however, are reported to have fallen from his lordship, from which it may be probably inferred that he at that time considered the reasoning of the Master of the Rolls as inconclusive; but there is nothing which approaches even to a formed opinion on the subject.

Two other cases were cited. The first is, *The Vauxhall Bridge Company v. Earl Spencer*, 2 Madd. 356; and, on appeal, Jac. 64. The subject of discussion, there, was an agreement made before the passing of the Vauxhall Bridge Act, between the projectors and the trustees of the Battersea Bridge: clauses to indemnify the latter for losses which they might sustain by the erection of the new bridge had been introduced into the bill, but they were objected to on the second reading in the lords, and the bill was in consequence withdrawn. This agreement was then secretly made, by which a sum of money was to be secured, and ultimately made payable to the proprietors of the Battersea Bridge, in lieu of the indemnity intended to have been given by the clauses in the bill. These were then expunged, and the bill presented and passed without them. It is unnecessary to notice some difference of facts which exists between the two cases, because it does not affect the ground of the vice-chancellor's (Sir T. PLUMER's) decision, which directly applies to the present question. He says, 2 Mad. 367, "The legislature and the public must have supposed the claim of compensation was given up, and that the money to arise from the tolls was to be applied as the act directs, and not in discharge of the money secured by this secret agreement. If the compensation had been publicly insisted upon, the legislature might have passed the bill without regarding the claim, or if they thought it a proper claim, might have refused to pass the bill, on the ground that the satisfaction of the claim would be too great a burden upon the undertaking. The object of the agreement was to prevent an opposition to the bill in parliament, and it was to be concealed from the legislature. Such an underhand agreement was a fraud upon the legislature, and contrary to principles of public

policy. The contract was invalid." The decree, however, which his honour pronounced after this strong expression of opinion, did not *decide* on the invalidity of the bonds given in pursuance of the agreement, but left that to be tried at law. There was an appeal, and Lord Eldon, Jac. 64, affirmed the decree. In the course of his judgment, however, he is reported to have made some remarks from which it appears that, in the view which he took of the facts, he doubted of the soundness of Sir T. PLUMER's reasoning. But it is remarkable that, as he stated then, he seems not to have adverted to that circumstance of purposed concealment from the legislature on which Sir T. PLUMER had laid so great stress, and that he certainly supposed a state of things before the lords, on the second reading, very different from that alleged in the plaintiff's bill and admitted by the demurrer. By the bill, it appeared that several lords "entertained objections," especially to the clauses in question, "on the ground that such a contract was illegal and contrary to public policy, being founded on an improper principle, and was likely to operate as a bar to the general improvement of the country." 2 *Mad.* 357. This Lord Eldon is made treat as "something that fell from some member of the committee," as an imagination "that scruples would be entertained;" and an objection, made by one member of the committee, "not sanctioned or known by the House at large." Jac. 68. With all the respect which we unfeignedly feel for the decisions of that most able and cautious judge, we are compelled to say that the reasoning which he is stated to have used, even on his own view of the facts, appears to us to be wholly inconclusive. "It is argued," he says, "that this was a fraud upon the legislature, but I think it would be going a great way to say so, for *non constat*, if it had been pushed to the extent of taking the opinion of the House, that it might not have passed the bill in its former shape." But, if the House might have refused to pass it in that shape, which is *a priori* equally supposable, and which the particular circumstances alleged make more probable, and if they were the constituted judges to determine whether they would or no, and, still further, if the parties applying for their decision knowingly withhold from them material facts, we are at a loss to understand how the possibility of a decision the same way, even with those facts apparent, removes the imputation of fraud, or the objection on the score of public policy.

One case remains to be noticed, that of *Edwards v. The Grand Junction Railway Company*, 1 Myl. & Cr. 650. The facts of that case, so far as they bear on the present point, were these. The line of an intended railway was to cross a turnpike road. The trustees opposed the bill, and prepared a petition to the lords against it. Subsequently a meeting took place, and clauses were agreed on to be introduced into the bill, which were satisfactory to the trustees, and on the faith of which they agreed to withdraw their petition. It was then suggested, on the part of the railway, that, as the introduction of the clauses into the bill would occasion delay and expense, the trustees should accept an agreement embodying their substance in lieu of them. This was yielded to, and the bill passed without them. The question was whether this agreement was binding; and both the present vice chancellor and lord chancellor held that it was. That case, however, is obviously distinguishable from the present. In the first place the bill, as it passed, contained nothing inconsistent with the stipulations in

the agreement, a circumstance relied on by the lord chancellor in his judgment. Secondly, if the clauses had been inserted, the opposition of the trustees, who were alone interested in them, would *ex concessis*, have been equally withdrawn; and then, the only parties interested assenting, the bill would have passed according to the usual course of the legislature with such bills under the same circumstances; but, as the agreement was to effect the very thing which the clauses would have provided for, it is impossible to say the legislature were imposed upon by it. This case, therefore, is not in point to one where the agreement between the parties and the enactments of the bill are opposed to each other. It, in fact, decided no more than this, so far as it bears on our present inquiry, that an agreement to make a particular bridge or viaduct of not less than fifty feet in width, in consideration of withdrawing opposition to a bill, one clause of which restricted the company from making any bridge or viaduct less than fifteen feet wide, might be binding.

It appears, then, that the conclusion to which we have come is sanctioned by the judicial opinions of Sir T. PLUMER and Lord LANGDALE; and that there is no decision, nor any clear expression of an opinion, the other way. We think there is great weight in the objection which arises to the validity of this contract from its being kept secret from the parties interested, who had given their assent to the bill which enacted a different line, and might either have withheld their assent at first, or withdrawn it and opposed the bill afterwards, if they had known of the intended deviation. But the view we have already explained renders any remarks on that, or the remaining point in the case, unnecessary.

We are, upon the whole, of opinion that the second plea is good, and there must be

S.

Judgment for the defendants.

The plaintiff brought a writ of error in the Exchequer Chamber, on the judgment upon the second plea. The case was argued in this vacation, Tuesday, June 18th, before TINDAL, C. J., VAUGHAN, BOSANQUET, and ERSKINE, Js.; PARKE, GURNEY, and MAULE, Bs.

Cresswell for the plaintiff in error, (the plaintiff below.) None of the points made for the defendants in the court below can be supported.

First, it was contended that Lord Howden, being a peer in parliament, could not legally make a pecuniary contract respecting the passing of a legislative measure. It was not denied that any individual, not a member of parliament, might accept a compensation for abandoning his opposition to a measure which injured him; and no reason can be assigned for depriving a peer of such a right. It is not a recognised principle that a member may not vote in cases affecting his interests; if it were, no landowner could vote on the question of the corn laws, no proprietor of bank or East India stock on a question relating to the charters of the Bank or East India Company. But, further, it is not to be assumed that Lord Howden would give any vote at all on this question; that is not contemplated in the agreement, nor is he compellable to do so; and he does not agree to support the measure, but only to withdraw his opposition. He might, besides, cease to oppose in the character of a landowner, as other landowners might, by not instructing any agent to appear against the bill, and yet be free to decide either

way, in his legislative capacity, upon a view of the public good or evil which the measure appeared to him likely to produce.

Secondly, it was objected that as the line was to pass through the land of other persons, it was a fraud on them to make this agreement without their knowledge. But they had no right to be privy to any terms which an individual landowner might choose to make with the company. If there was any obligation to communicate such a bargain to the other landowners, it was incumbent on the defendants: the plaintiff entered into no express or implied contract or understanding with any other landowners.

Thirdly, it was objected that this agreement was not made known to parliament at the time when the act was passed. Now the agreement is between the plaintiff and the company; and the plaintiff has never done any thing imposing upon him the necessity of communicating with parliament at all. The course in such transactions is, in fact, for parties to announce to the committees of the houses that they have agreed; but parliament does not interfere with the terms of such agreements. It is contended that, inasmuch as the agreement provides for a future deviation, the legislature was deceived, and the plaintiff was a sharer in the deceit, because the parties had in contemplation to represent one line as the best to parliament, and then construct another. This view seems to have been partly sanctioned by Lord LANGDALE, M. R., in *Simpson v. Lord Howden*, 1 Keen, 583, where a bill was filed by the present defendants, praying to have the agreement delivered up to be cancelled, and a demurrer to the bill was overruled. But Lord Howden was no party to any misrepresentation; he simply assents to a proposal that he shall give up his interests in the company's favour, on condition of a certain compensation and of an alteration to be obtained, if possible, which is to lessen the injury done to him. The not communicating such an agreement to strangers cannot make it illegal unless it be illegal in itself: and *The Vauxhall Bridge Company v. The Earl of Spencer*, Jacob, 64, shows that withdrawing opposition to a bill may be a good consideration for payment to be made in compensation. Possibly, if the contract had provided for positive concealment, the objection would have been more specious. *Catlin v. Bell*, 4 Campb. 183, and *Hodgson v. Temple*, 5 Taunt. 181, show that a bargain respecting goods may be enforced by a party who knew that the other party intended to smuggle them. [TINDAL, C. J. Not if the bargain is to affect that.] That distinction is in favour of the plaintiff. Lord LANGDALE's decision in *Simpson v. Lord Howden*, 1 Keen, 583, was reversed by Lord COTTENHAM, C.; *Simpson v. Lord Howden*, 3 Myl. & Cr. 97. The lord chancellor there threw doubt upon the doctrine laid down by the master of the rolls on the point now under discussion; but he reversed the judgment, it is true, upon a distinct point. Suppose this contract had been made before the act was applied for, what pretence would there have been for treating it as a fraud on parliament? But what difference can it make that the contract was not concluded till the bill was in parliament, the terms being the same? Or, again, suppose the act had passed before any contract had been made, and afterwards, upon Lord Howden claiming compensation before a jury, the parties had agreed to give him 5000*l.*, and attempt to obtain a fresh act authorizing a deviation. That transaction would have been free from the objection now made, yet the situation of all parties would

have been the same as it is now. It can make no difference whether the money be to be paid immediately, or six months after the royal assent shall have been given. Indeed, the record does not show that the bill was before parliament at the time of the contract. No objection can arise upon the ground of public policy; the general policy of the law is, that any owner of property shall make such terms respecting the abandonment of any of his rights as may seem fit to himself and the other contracting party. Further, supposing the contract vicious, so far as regards the deviation, the other terms, which contain simply an abandonment of Lord Howden's rights for a consideration, may well stand. "If some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful," "the covenants or conditions which are against law are void *ab initio*, and the others stand good;" *Pigot's Case*, 11 Rep. 26 b, 27 b. The same rule as to conditions void by the common law is to be found in *Norton v. Simmes*, Hob. 12, (a) and *Mosdel v. Middleton*, 1 Ventr. 237. It is true that if part of the consideration of a promise be against law, the whole contract is void; *Featherston v. Hutchinson*, Cro. Eliz. 199; but here the question arises as to distinct parts of the promise itself. *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 East, 87; *Howe v. Synge*, 15 East, 440, illustrate this point. [MAULE, B. In those cases the illegality consisted in contracting not to claim deductions in respect of the property-tax; stat. 46 G. 3, c. 65, s. 115, enacted that "all contracts, covenants, and agreements made or entered into, or to be made or entered into for payment of any interest, rent, or other annual payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly void." The particular covenant, &c., was all that the words of the statute reached.] *Kerrison v. Cole*, 8 East, 231; *Chesman v. Nainby*, 2 Str. 739; S. C. 2 Ld. Raym. 1456; S. C. in error in Dom. Proc., 1 Bro. P. C. 234, (2d ed.); *Newman v. Newman*, 4 M. & S. 66, are also illustrations of the general distinction. [TINDAL, C. J., mentioned *Mouys v. Leake*, 8 T. R. 411.] If the legal and illegal contracts depend one upon the other, the law no doubt is the other way; but that is not so here. [PARKE, B. If I sell a horse to a man who agrees to give me 50*l.*, and steal another horse, am I enforcing an illegal bargain by suing for the 50*l.* ?]

Joseph Addison, contra. The answer to the question just put would depend upon the fact, whether the horse was given for the 50*l.*, and the promise to steal, or whether the promise to steal was altogether an independent matter, and the horse was sold for the 50*l.* only. In the latter case, an action might be brought for the 50*l.*, not in the former; but the case here resembles the former. The plaintiff withdraws his opposition, and gives "his assent," on condition of the stipulations in the agreement being performed. Now the agreement contains a stipulation that the defendants will endeavour to obtain an act authorizing them to deviate. And the covenant of the defendants is that, if the "present bill" be passed in the then session, they will pay the plaintiff 5000*l.* for compensation in respect of the railway as made on the deviated line, exclusive of other possible damages. It cannot be said that the deviation is not a part of the contract mixed up with the whole. If the line made according to the deviation be illegal, the 5000*l.* cannot be recovered; for it is to be paid for the damage done by that line.

In answer to the first objection it is contended that the plaintiff had a right to bargain as to his own land, although he was a peer. But the objection is that he is selling his vote. [ERSKINE, J. The dissent may be merely in the character of an individual.] He contracts, not merely to withdraw his opposition, but to "assent:" if he had voted against the bill, that would have been a breach of the contract. (a)

In answer to the second objection, it is said that any party interested may individually get the best terms which he can. But, if the whole be part of a common scheme, as a railway, a secret bargain by one such party is a fraud on the rest. [TINDAL, C. J. You would compare it with a deed of composition, where the law will not permit one creditor secretly to get better terms than the others.] It is an analogous case. If the other parties had known of these terms, they would themselves have probably made their bargains differently. [ERSKINE, J. It is not averred that any one was to know what any other gave. It is not like a case of underwriters subscribing the same policy: each may have assented on different terms. PARKE, B. Under a deed of composition, each creditor is supposed to receive the same terms, and no one would join if he were told that the debtor meant to make separate bargains with each.] All parties are together before parliament. The agreement is like a bargain for giving a creditor money to induce him to sign a certificate. Besides, the other parties here assent upon the belief that the railway is to follow the line preferred in the original bill, which (sect 46) prohibits a deviation, except within small limits. (b) Their consent is not stipulated for in the agreement; and it is not only possible, but highly probable, that they would have opposed the original bill had they been made acquainted with this bargain. When they have to oppose the new bill their situation is altered. The bargain is, in effect, for the misapplication of the funds.

Lastly, the transaction is a fraud on the legislature, who are trustees for the public. It is a secret agreement to obtain the consent of parliament on the supposition that a line is to be followed, which it is intended to abandon. *The Vauxhall Bridge Company v. The Earl of Spencer*, Jacob, 64, has been cited to show the legality of such a bargain. That case came first before Sir THOMAS PLUMER, V. C.; *Vauxhall Bridge Company v. Earl Spencer*, 2 Madd. 356; and his honour held the agreement to be illegal. But afterwards, when the answers were put in, the concealment from the legislature, and agreement to conceal, were contradicted; and in that shape the case, *The Vauxhall Bridge Company v. The Earl of Spencer*, came before Lord ELDON, whose language, therefore, cannot apply to this case. Lord COTTENHAM's judgment in *Simpson v. Lord Howden*, 3 Myl. & Cr. 97, decides nothing as to the principle now in question; and Lord LANGDALE's opinion, in the previous case of *Simpson v. Lord Howden*, 1 Keen, 583, is expressly in favour of the defendants. In *Edwards v. The Grand Junction Railway Company*, 1 Myl. & Cr. 65C, a private agreement to cease opposing the bill, in consideration of some advan-

(a) On this point, Sir F. Pollock cited, in the Court below, *Gilbert v. Sykes*, 11 East 150, and the words of Lord Mansfield in *Jones v. Randall*, Cowp. 37. 39.

(b) The act is stat. 6 & 7 W. 4, c. lxxxii. (local and personal, public,) "for making a railway from the city of York to and into the township of Altofts, with various branches of railway, all in the West Riding of the county of York or county of the said city." See stat. 7 W. 4, & 1 Vict. c. lxviii. (local and personal, public,) "to alter the line of the York and North Midland railway, and to amend the act relating thereto."

tages in addition to those given by the act, was considered not to be illegal on the ground of injustice towards shareholders who were ignorant of the agreement. But there, as Lord COTTENHAM, C., pointed out, the advantage, which was the construction of a bridge wider than those which the company were compelled to make by the act, was consistent with it: here the contract is for a line inconsistent with the original bill.

Cresswell, in reply. The 5000*l.* is not given for the damage done by the intended deviation. Lord Howden, in consideration of withdrawing his opposition, is to receive 5000*l.* at any rate; and more if the deviated line be not adopted.

As to the word "assent," it relates merely to the proof required by parliamentary committees respecting individual landowners.

Cur. adv. vult.

TINDAL, C. J., in this vacation, (3d July,) delivered the judgment of the Court.

In this case a writ of error has been brought on a judgment of the Court of Queen's Bench on a demurrer to a plea. Lord Howden, the plaintiff below, brought an action against the defendants upon a covenant contained in a deed, by which, after reciting that a bill had been introduced into parliament for making a railway intended to pass through the estates, and near the mansion of the plaintiff, and which the plaintiff thought likely to be injurious thereto, and therefore he was a dissentient from the undertaking, and was about to oppose the passing of the said bill, the plaintiff agreed, on condition of the stipulations in the agreement contained being performed, to withdraw his said opposition to the bill, and assent to the railway; and the defendants, four of the proprietors of the intended railway, agreed, in case the said bill should be passed into a law within the then session of parliament, to give 5000*l.* to the plaintiff towards compensation for the damage he would sustain, within six months after the passing of the act; and also agreed that they would, in the next session of parliament, apply for, and use their best endeavours to obtain, an amended act, for making a deviation from the line of the railway in a particular direction. The deed contains many other stipulations, not material to be adverted to; but it is to be observed that there is none which expressly states, or from which it can be implied, that the agreement, or any part of it, was to be kept secret. The declaration on this deed alleges that the act passed, and that six months had since elapsed, and that the money was not paid.

The first plea states that the company of proprietors had abandoned the proposed line, and in lieu thereof resolved to adopt another, which entirely avoided the lands of the plaintiff; and had presented a petition to parliament for, and were using every effort to obtain, an act of parliament for carrying it into effect. To this plea there was a demurrer; and the Court of Queen's Bench held the plea to be bad. And, on the argument before us, it was not insisted that it was a good plea. It is, indeed, beyond all question that this plea affords no answer to a covenant to pay the 5000*l.* absolutely at the end of six months after the passing of the act.

Upon the second plea, to which there was also a demurrer, the Court of Queen's Bench gave judgment for the defendants. (His lordship here read the second plea, p. 797, *antè*.)

The objections founded on this plea were threefold. First, that the deed was a fraud on the legislature; secondly, that it was a fraud on the proprietors of lands on the line of the railway; and, thirdly, that it was void because it was against law that the plaintiff, a peer of parliament, should make a bargain which placed his private interest in conflict with his public duty.

The Court of Queen's Bench decided that the deed was invalid on the first ground, and gave no opinion upon the other two; and indeed little reliance was placed on them in the course of the argument in this Court. And we are of opinion that no one of those objections ought to prevail, and that the judgment must be reversed.

The ground upon which the deed in question was contended to be a fraud on the legislature is this,—that the plaintiff and the defendants were to be considered as having agreed together to represent to the legislature the line of road described in the then pending bill as the line which was to be adopted and acted upon, whilst, in truth, they intended at the time to apply for, and adopt, and act on, another, if obtained. This is the view which Lord LANGDALE inclined to think might ultimately be taken of this transaction, *Simpson v. Lord Howden*, 1 Keen, 583. It was also argued that Lord Howden and the proprietors must be considered as having agreed to represent the proposed line of the road as the best for the public interests, though in reality they never meant to carry it into effect, and had a better in prospect. In either view of the case, the supposed fraud consists in an intention to make a false representation to the legislature, by stating the object of the adventurers to be to carry one line into effect, and concealing the design of applying for another. In both it is essential, in order to make the deed a fraud on the legislature, that the contract to apply for a new act should be intended by both parties to be kept secret from it. For, if it was to be disclosed, the idea of an intended fraud upon parliament is obviously out of the question. It is not enough that the existence of such an agreement was, at the time of entering into it, and afterwards, in fact, kept secret from the legislature and all the world besides, by both parties. The quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it; and, if there did not then exist the intention of deceiving the legislature, by concealing from it, whilst the petitioners were asking for one set of powers, the purpose of asking afterwards for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment. This point appears to us to be clear; and, on looking carefully at the plea, we find that there is no averment of any such intention on the part of the plaintiff or of the defendants at the time of the making of the agreement, or of any intention to make any untrue statement to the legislature. It is, indeed, alleged in the plea that the agreement was secret, and was kept secret; but it is quite consistent with every averment in the plea that both parties may have been innocent of any original fraudulent understanding that the transaction should be kept secret at the time the deed was executed. As the instrument is not, upon the face of it, fraudulent, as no intention of making any false representation, or of concealing any thing, can be collected from any part of it, the facts which make it fraudulent ought to be distinctly alleged in the plea: and no such facts are alleged. The subsequent concealment from the legislature might

indeed have been used as evidence to the jury of the prior intent to conceal, if that intent had been averred; but such subsequent concealment would be evidence only, and would by no means be conclusive evidence; it cannot be used to supply the want of such a distinct averment. It is not necessary, therefore, to decide whether such an intention, if it existed, would have avoided the deed, and, if averred, on the plea, would have made it a sufficient answer to the declaration. Now this defect in the plea does not appear, so far as we know, to have been distinctly brought to the attention of the Court of Queen's Bench; and the judgment pronounced by that Court seems to have proceeded upon an assumption of the intention of both parties to keep the whole transaction secret.

The same observation disposes altogether of the objection to the deed on the ground that it was a fraud on the landowners. It is suggested to be a fraud, either on the ground that, if the fact of Lord Howden having obtained apparently so large a compensation had been disclosed to the landowners, it would have induced them to insist on better terms for themselves, or on the ground that, if the intention not to act upon the powers given by the statute had been known to them, they might have made a different disposition of their lands. But, on either view, the intention to keep either one branch of the agreement or the other a secret from the landholders is essential to make the deed fraudulent; and no such intention is averred. If such intention had even existed, there would still be a difficulty in holding that the deed would be fraudulent, on the ground that the supposed goodness of the bargain was intended to be concealed; for it would seem that each landowner might lawfully make the best agreement he could for himself with any company of projectors, just in the same manner as if a private individual, for any purpose of his own, were negotiating to purchase the land of the same persons. There is no common obligation on all the different proprietors to place themselves on the same footing, as there is in the case of a general composition with creditors, in which case there is sometimes an express, and generally an implied, agreement that all, or all who are not expressly excepted, shall share equally and derive an equal benefit from the estate of the insolvent. It is that agreement or understanding alone which imposes an obligation on each creditor to be in the same situation as another; and there seems no analogy between their situation and that of unconnected landowners.

The last objection is, that the deed was illegal, as it places the private interest and the public duty of the plaintiff, as a peer of parliament, in opposition to each other. We can have no hesitation in saying that, if it were averred in the plea, and proved, that the sum of 5000*l.*, or any part of it, was really paid as a consideration for Lord Howden's giving his vote for, or withholding his vote against, the bill, and that the statement in the deed was in this respect a mere colour to conceal the real nature of the transaction, the deed would have been thereby rendered corrupt and illegal, and consequently void; and that no action would lie for any part of the money. But illegality is not to be presumed; it is to be alleged and proved when it does not appear on the face of the instrument itself. Though Lord Howden was a peer, that would not affect his right to make any bargain for the sale of his land, or for a compensation for an injury to it; if it did, a peer or member of parliament would be placed in a worse condition than any private individual.

We must presume, as there is no averment to the contrary, that his quality of peer in no way affected the bargain in question, and that he was left, notwithstanding that agreement, to exercise his free judgment and give or withhold his vote, according to his conscience, upon the measure, when it came before him in his legislative capacity. In the absence of any agreement or understanding that the vote should be given in a particular way, the mere tendency or possible effect of such a contract on the vote of a member of either House cannot be taken into consideration.

We are, therefore, of opinion, that none of the objections urged by the defendants in error can prevail; that the pleas of the defendants cannot be supported in law; and that the judgment of the Court below must be reversed.

Judgment reversed.

JOHN JOSEPH STOCKDALE against JAMES HANSARD,
LUKE GRAVES HANSARD, LUKE JAMES HANSARD,
and LUKE HENRY HANSARD.—p. 822.

Judgment was given in this case in the last Trinity term, May 31st. The case is reported, 9 A. & E. 1.

See *Stockdale v. Hansard*, post, vol. 11, Hil. T. 1840: and the *Case of The Sheriff of Middlesex*, same vol. and term; and stat. 3 & 4 Vict. c. 9.

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Held that, under stat. 3 & 4 W. 4, c. 42, s. 23, the judge at Nisi Prius might amend the record, agreeably to the evidence, by striking out the words "for the general conveyance of passengers" in the declaration and plea. *Evans v. Fryer*, 609

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Held, that the latter annuity was void, under stat. 53 G. 3, c. 141, s. 2, for want of enrolment; and the court, upon motion, set aside, not only the annuity deed of 1837, but also that of 1835, together with the warrant of attorney and judgment thereon, and the power of attorney to receive the pension.

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Held, also, that such award was uncertain in not specifying the value, quality, or description of fixtures to be set up by the lessee, and might be set aside by the lessor.

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Held, that the award was good, and not repugnant; for that the finding on the 3d and 4th issues must be regarded as hypothetical, and only for the purpose of determining the costs of them; and that it could not be inferred, from such finding, that there was matter in difference in respect of work done, other than the work included in the action. *Beaufort (Duke) v. Welch*, 527

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To a penal action on 32 G. 2, c. 28, ss. 1, 12, against the sheriff for carrying a party arrested by him to a tavern, without his free and voluntary consent, defendant pleaded that he did not carry the plaintiff to a tavern without his free and voluntary consent, modo et forma. Held, on issue joined thereon, that as the plea admitted an arrest by the defendant, and as the evidence showed the arrest to have been made by the same officer who carried the plaintiff to the tavern, there was no necessity for further connecting defendant with the act of the officer by proof of the warrant. *Quære*, whether the plea operated as a denial both of the carrying to the tavern, and of the consent; or only of the consent?

While the officer was illegally carrying the party to gaol within twenty-four hours after arrest, the prisoner, to avoid being taken to gaol, consented to go to a tavern, and there draw up an agreement for the purpose of getting discharged: Held, that a consent so

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obtained was not free and voluntary within the statute, and that the plea was properly negatived by the jury. *Barsham v. Bullock*, 23

V. Effect.

1. Distinction between legal and illegal.

When a party is arrested in one action, he is in custody of the sheriff in all actions in which writs have been delivered to the sheriff.

But, if the first arrest be illegal, the party cannot be detained under other writs without a fresh arrest.

Such fresh arrest is not prevented by the custody under the former illegal arrest, if there be no collusion.

But if a sheriff's officer, having arrested without a warrant, procure, for the purpose of making the arrest good, his own name to be inserted in a warrant properly issued in an action to another officer, an arrest or detainer in this action will not warrant a detainer under a ca. sa. in another suit, which had been delivered to the sheriff before the first arrest, and no warrant issued on it: nor can the sheriff's officer resort to such last-mentioned writ to support the original arrest; but the court will discharge the party as to the prior suit. And this, though affidavit be made negativing collusion between the plaintiff in the prior suit and the sheriff or his officer.

Quære, whether a defendant, since stat. 3 & 4 W. 4, c. 67, s. 2, can be arrested on a judgment and ca. sa., both more than a year old, and the ca. sa. having issued within a year of the judgment, without a scire facias. *Collins v. Yewens*, 570

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II. Certificate of dismissal.

Trespass for assault and battery: Plea, that plaintiff had complained of the same trespasses to two justices, according to the stat. 9 G. 4, c. 31, s. 27, who had dismissed the complaint, and thereupon did, "according to the said statute, forthwith make out a certificate," "stating the fact of such dismissal," and delivered it to defendant, whereby defendant was released, &c.

Held, on special demurrer, that the plea was bad for not showing that the complaint had been dismissed upon one of the grounds specified in sect. 27; and, *semble*, the certificate itself ought to show the ground of dismissal. *Skuse v. Davis*, 635

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Before stat. 7 W. 4 & 1 Vict. c. 55, the sheriff was not entitled to take from a party arrested a larger fee for detaining him *in* bail given, than the *4d.* allowed by stat. 3 H. 6, c. 9.

And a sheriff's officer, taking more, *was* liable to the penalty under stat. 32 G. 2, c. 28, ss. 1, 12, though appointed, by the plaintiff in the original cause, a special bailiff for making the arrest. *Plevin v. Prince*, 494

III. Of liberty.

1. What is a mandate.

In an action against the bailiff of the liberty of P. in the county of Y. for the escape of a prisoner in execution, the declaration alleged a mandate by the sheriff of Y. to the defendant "as chief bailiff of the liberty of P. or his deputy," to take W. T., if found in his liberty, &c. The instrument produced in proof of the averment was in the form of a common sheriff's warrant, and was addressed by the sheriff to the keeper of the county gaol, "the chief bailiff of P. his deputies and J. D. my bailiffs," and commanded them, jointly and severally, to take W. T. if found "in my bailiwick," &c., "that I may have the bodies," &c. The deputy of the defendant thereupon arrested and conveyed W. T. to the county gaol out of the liberty.

Held, that the averment was not proved; for that the precept was not a mandate to defendant as bailiff of a liberty, but a warrant to him as sheriff's bailiff, and acted upon as such; though it was shown that defendant, when ruled by plaintiff to return "the mandate," had obtained time to do so, and had not then set it up as a common warrant.

Per Patteson, J. A bailiff of a liberty, when addressed in the mandate as the sheriff's bailiff, may waive his franchise and act upon it in the latter character.

In such an action the plaintiff is not estopped by the sheriff's return of *cepi corpus* in the writ of ca. sa. *Jackson v. Hill*, 477

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Depositions.

Where a petitioning creditor, having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat. Held, that the deposition then made was evidence of the act of bankruptcy as against such creditor in an action against him by the assignees, in which the act of bankruptcy was put in issue. *Gardner v. Moutt*, 464

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III. Separate maintenance: for what husband continues liable.

If a husband living separate from his wife, and allowing her a maintenance, uses such violence towards her that she is obliged to exhibit articles of the peace against him, she may employ an attorney for that purpose at his expense.

And if such attorney sues the husband for his costs, the court will not inquire whether or not the wife could have paid them out of the maintenance, without resorting to the husband. *Turner v. Rooks*, 47

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. What is one, and what is not.

Promise in writing as follows:—

"I agree to pay D. 695*l.* at four instalments, viz., the first one," &c., "being 200*l.*;"

and so on, specifying three others, the four amounting to 600*l.*; "the remainder 95*l.* to go as a set-off for an order of R. to T., and the remainder of his debt owing from D. to him."

Held, not a promissory note, for such note must be entire, and this instrument contained a promise to pay, joined with an agreement for something else. But

Held good evidence of an agreement to pay, in consideration of being found indebted on a statement of account, though no consideration was expressly stated on the instrument itself. *Davies v. Wilkinson*, 98

II. Accommodation.

What is an acceptance for plaintiff's.

Plaintiff having promised to indemnify G. against the consequence of a bail-bond into which G. had entered at plaintiff's request, and G. being forced to make a payment in consequence, it was agreed between plaintiff and defendant that plaintiff should obtain the money by discounting a bill drawn by plaintiff and accepted by defendant.

Plaintiff sued defendant on the bill; and defendant pleaded that it was accepted for plaintiff's accommodation.

Held, that a jury might find for defendant on this issue, although plaintiff was not liable on his promise to indemnify, it not being in writing. *Cresswell v. Wood*, 460

III. Consideration.

1. Usurious, when protected, 675. **USURY.**
2. Valuable, 784. **Post, VIII. 6.**

IV. Endorsement: fraudulent, 106, 784. Post, VIII. 6. IX. 2.

V. Payment: re-delivery.

The maker of a note, not negotiable, cannot refuse to pay the amount when due, on the ground that the payee has not got it in his possession or power, and cannot produce it for the purpose of delivering it up to the maker on payment. *Waine v. Bailey*, 616

VI. Notice of dishonour.

1. What sufficient.

"D.'s acceptance for 200*l.*, drawn and endorsed by you, due 31st July, has been presented for payment and returned, and now remains unpaid," is a sufficient notice of dishonour. *Cooke v. French*, 131, n.

2. What insufficient.

Messrs. S. and Co. inform Mr. P. that Mr. B.'s acceptance, 87*l.* 5*s.*, is not paid. As endorser, Mr. P. is called upon to pay the money, which will be expected immediately. December, 1836.

Held, not sufficient notice to P. of dishonour of a bill accepted by B., payable December 24. *Strange v. Price*, 125

VII. Interest.

A promissory note in this form, "I promise for myself and executors to pay F. H. or her executors, one year after my death, 300*l.* with legal interest," bears interest from the date of the note. *Roffey v. Greenwell*, 222

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3. Plea of gaming consideration, 59, n. Post, IX, 6.

4. Non-production, when a bad plea, 616. Ante, V.

5. That endorsee is not a bonâ fide holder.

To assumpsit on a bill of exchange drawn by defendant, endorsed by him to H., and by H. to plaintiff, defendant pleaded that he endorsed in blank, and never delivered the bill to H., but delivered it to L., who, till H. became possessed, held it for the sole use of defendant, and for the specific purpose that he, L., should get it discounted for, and pay the proceeds to, defendant; that L., fraudulently and covinously, in violation of good faith, and contrary to the said purpose, delivered the bill to H., and H. took it, without discounting for defendant, contrary to the said purpose, and in breach and violation thereof, to wit, for the purpose and under colour and pretence of securing an alleged debt from L. to H.; that H. was not a bonâ fide holder for value or consideration, and that plaintiff was not at any time a bonâ fide holder for value or consideration; and that defendant never had received consideration or value from L., or H., or plaintiff, or any other, for the endorsing or payment of the bill. Replication *de injuriâ*.

Held that, on this issue, the question as to plaintiff was, whether he gave any value for the bill; and that, if he did, he was entitled to the verdict, though the circumstances of the fraud alleged might in other respects be true, and the plaintiff privy to them, for that the denial of his being a bonâ fide holder for value, as here worded, did not raise the question of his privy to the fraud. *Uther v. Rich*, 784

6. Fraud how raised, 784. Ante, 5.

7. *De injuriâ* to plea of payment containing surplusage, 593. PLEADING, XVIII.

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1. Competency of drawer of accommodation bill, 606. WITNESS, I, 2.

2. Declarations of former holder.

Assumpsit by endorsee of a note against maker. Plea, that the note was made without consideration, and endorsed and delivered to W. for the purpose only of its being discounted; that W., in fraud of defendant, and without his consent, endorsed the same and delivered it to plaintiff, who gave no consideration, and knew of the want of authority. Replication, *de injuriâ*.

Held, that evidence of declarations made by W. was not admissible to prove the fraud, W. being alive and not called, and no proof having been previously given of any connection between W. and the plaintiff, or that the plaintiff took the bill under circumstances establishing a privity in point of law between him and W. *Phillips v. Cole*, 106

3. Presumption that note was given for value, 222. Ante, VII.

4. Notice to produce, 597, n. Post, 6.

5. Identity when admitted, 593. PLEADING, XVIII.

6. Production when unnecessary.

To a declaration in assumpsit on a check, defendant pleaded that it was given for money

won at an unlawful game at dice. Issue thereon. The defendant did not give notice to produce the check. Held, that, on this issue, the plaintiff was not bound to produce the check, either as part of his own case, or, when called upon to do so at the trial, as part of the defendant's evidence. *Read v. Gamble*, 597, n.

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7. Verdict, &c., in former action, 593. PLEADING, XVIII.

BONA FIDES.

I. Entitling a party to notice of action.

Where a statutory protection is given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed, *bonâ fide*, that he was so acting. There must be reasonable ground for the belief.

If the party acted under a reasonable, though mistaken, persuasion, from appearances, that the facts were such as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such that the statute clearly affords no justification.

Thus, if, by the assumed authority of stat. 7 & 8 G. 4, c. 30, s. 28, which gives power to arrest persons found committing certain offences, a party has arrested another as being so found, under circumstances which afforded reason for thinking that he was, at the time, committing such offence, though in reality he was not, and an action is brought for the arrest, the defendant is entitled to notice of action under sec. 41. *Cann v. Clipperton*, 582

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BROKER.

I. 1. Implied authority.

A person employing a broker to sell shares, directed him, by mistake, to sell 250 shares, meaning 50. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder, on the next day, informed his broker of the mistake, and asked if the bargain could not be made void; the broker answered "No;" and the shareholder then said he must leave the matter in his hands to do the best he could. By the rules of the Stock Exchange, brokers, on sales of this description, do not name any principal, and if the vendor is not prepared to complete his contract, the purchaser buys the requisite

number of shares, and the vender is bound to make up the loss, if any, resulting from a difference in prices. The broker paid such difference, being unable to complete his contract, and the purchaser having made good the shares at a loss. Held, that for the difference so advanced, the shareholder was liable to the broker in assumpsit for money paid.

Per Lord Denman, C. J., and Littleale, J. A person who employs a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules. *Sutton v. Tatham*, 27

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Where an act of parliament authorized and required a select vestry, from time to time, as often as occasion required, to make rates for the relief of the poor, and the repair of churches and highways in the parish: Held, that they were not compellable to make a church-rate where the churchwardens refused to state the necessary amount, or to furnish any estimate of it, or to give to the vestry any information whereby they might ascertain it. *Regina v. St. Margaret, Leicester*, 730

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II. Under acts for public works.

1. Claim of tenant from year to year.

The London and Southampton Railway Act (4 & 5 W. 4, c. lxxxviii.) provides that all tenants from year to year shall deliver up possession to the company at the expiration of six calendar months next after notice, whether such notice be given with reference

to the commencement of the tenancy or not, and whether before or after the purchase of the lands by the company, or at such time after the expiration of the notice as they shall be required; and that where any such tenant shall be required to give up possession before the expiration of his term or interest, the company shall make compensation for the value of his unexpired term or interest. On 10th January the company gave six months' notice under the act to a tenant from year to year, whose holding began at Christmas: after the expiration of the notice, the tenant, who had refused to quit without compensation, was told by the company that possession would not be required till Christmas: the company did not take a conveyance of the reversion till 25th August.

Held, that the tenant, who voluntarily continued to occupy as usual till Christmas, was in the same situation as if a regular landlord's notice had been originally given to him, and was therefore not entitled to compensation. *Regina v. London and Southampton Railway Company*, 3

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Plaintiff being about to compound with his creditors, defendant, a creditor, refused to subscribe the deed unless he were paid in full; plaintiff, to obtain his signature, gave a bill, payable to defendant's agent, for the difference between 20s. in the pound and 8s., the proportion compounded for. Defendant then signed the deed. Plaintiff did not honour the bill when due; but, on subsequent application, he paid it some months after the dishonour by two instalments to the payee, and defendant received the money. The other creditors were paid according to the deed.

Held, that plaintiff could not recover back the amount paid to defendant above 8s. in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be reopened; and that it made no difference that the sum in question had not been recovered by action. *Wilson v. Ray*, 82

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The surrogate of the bishop's official principal is not the proper party to signify the contumacy of a defendant in a suit before him as judge of the Consistory Court; and this both before and after stat. 53 G. 3, c. 127: and, where defendant is taken under a contumace capiend issued upon such certificate, this court will discharge him out of custody. *Regina v. Jones,* 576

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Where a conviction under sect. 14 of stat. 11 G. 4 & 1 W. 4, c. 64 (for the general sale of beer, &c.), purported to charge the party with the offence of keeping his house open for the sale of beer, and selling beer, and suffering the same to be drank and consumed in the house at an unlawful time, and convicted him in the penalty of 40s. as upon a single offence:

Held, that the conviction was bad, because it included more than one distinct offence; and that trespass lay for levying the penalty by distress. *Newman v. Bendyshe,* 11

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Held, also, that the lord was not bound to make a further deduction by reason of his privilege of naming the lives, or of the mature ages of the trustees.

The reasonableness of such a fine, where the value of the land and the amount of deduction are undisputed, is not a question for the jury. *Wilson v. Hoare*, 236

2. Where the lord admitted fourteen joint-tenants to a copyhold of inheritance, with a power in himself to nominate nine others with the approbation of a master in chancery, when the number should be reduced to five, and thereupon to take a reasonable fine on such fresh admission of the old and new tenants:

Held, by the Court of Exchequer Chamber, that the principle of assessment laid down in *Wilson v. Hoare*, 2 B. & Ad. 350, was inapplicable, and that a deduction should be made on account of the right to take a new fine on the failure of nine lives out of fourteen, instead of nine absolutely. *Hoare v. Wilson*, 245, n.

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An interpleader rule directed the sheriff to

sell the goods claimed, and pay the proceeds into court to abide the event of an issue between the claimant and the execution creditor, to try the right to them. The jury, on the trial of the issue, found that part of the goods were the sole property of the claimant, and the residue the joint property of the claimant and the party levied upon: Held, that the claimant was entitled to be paid by the execution creditor the general costs of the feigned issue (deducting the costs of the issues found for the latter), and also the costs of appearing to the interpleader rule, and of his subsequent application for the money paid into court, and for his costs.

And the sheriff was refused his costs of the interpleader rule. *Staley v. Bede*, 16

IV. Taxation.

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The expense of a witness at *Nisi Prius* to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for, and obtaining copies and translations of, such records to be used in evidence, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them.

The costs of the attendance of an officer of the Court of Chancery, to produce affidavits filed there, for the purpose of using them at a trial to check the testimony of the same deponents at *Nisi Prius*, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them. *Bastard v. Smith*, 213

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- 1. Nature of office, 646. *WRECK.*
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III. Action for seizure.

In trespass for taking a portfolio and drawings, the defendant, an officer of the customs, may justify the seizure by showing that the portfolio contained drawings liable to seizure for non-payment of duty, which the plaintiff was in the act of carrying ashore out of a foreign packet; though the seizure was in fact made not as on a forfeiture, but for the purpose of examination; and though the

articles seized were in fact returned after being examined, and no demand of them had been made before the seizure.

Seemle, that if the plaintiff had sued for the assault, the defendant could not have justified without showing either a previous demand or some circumstance to warrant the use of force in the first instance.

Notice of action (under stat. 3 & 4 W. 4, c. 53, s. 103) by an infant to an officer of the customs, may be given by his *prochein amy*, although he may not be the *prochein amy* on the record. *De Gondouin v. Lewis*, 117

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III. In lieu of sacramental test.

Under stat. 9 G. 4, c. 17, ss. 2 and 3, which require that every person who shall be placed, elected, or chosen in or to the office of alderman, &c., shall, *within one calendar month next before or upon his admission* into such office, make and subscribe a certain declaration before certain parties; and sect. 4, which enacts, that, if he shall omit or neglect to make and subscribe the said declaration in *manner above mentioned*, such placing, election, or choice shall be void.

Held, by the Court of Queen's Bench, that the election is not void by refusal to make the declaration, or state whether the party will do so, unless he has first been admitted to the office by swearing in.

Judgment reversed on error, by the Court of Exchequer Chamber.

Held, by that Court, that the statute does not give the party elected a month at all events for deciding whether he will make the declaration or not, but only excuses him from making it at the time of admission, if he has made it within a month before.

That the words "upon his admission" mean at the time, and not within a reasonable time after, and that the authorities who admit

may prescribe the order in which the ceremonies forming parts of the admission shall take place.

And that, if the party offers himself to the proper court to be admitted, not having made the declaration within a month before, and being asked whether he will make it or not, declines to say, but requires the court to admit him, which they refuse, the election is thereupon void, and a precept may issue for a new election. *Regina v. Humphrey*, 335

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A cognisance by defendant as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death: such distress, though made before probate, having been afterwards adopted and ratified by the executor. *Whitehead v. Taylor*, 210

II. Number of appraisers.

Stat. 57 G. 3, c. 93, regulating the costs of distress for rent not exceeding 20l., has not repealed the provisions of 2 W. & M. sess. 1, c. 5, so as to make an appraisement by one broker sufficient. *Allen v. Flicker*, 640

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II. Postea.

An ejectment brought for close A. and close B. was referred at Nisi Prius to an arbitrator, together with an action for trespass upon close B., brought by the lessor of the plaintiff against the same defendant. In the action of trespass there were special pleas justifying on the ground of title to close B. in defendant.

The arbitrator ordered a verdict on all the issues in trespass for the defendant, except one issue on a plea of not guilty: but he ordered a general verdict for the plaintiff in the ejectment. By a paper which he delivered with the award, stating his reasons, it appeared that he considered that the lessor of the plaintiff had no title to close B.

Held that, though there appeared a repugnancy, the postea in the ejectment could not be amended by confining it to close A., and that the lessor of the plaintiff was entitled to retain the general verdict. *Doe dem. Oxenden v. Cropper*, 197

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1. Staying proceedings in subsequent ejectment.

Where the lessor of the plaintiff in ejectment is son and heir of the lessor in a former ejectment, and claims under the same title, and against the same defendant, but brings his action for different premises, the court will stay proceedings until the costs of the first action are paid.

And this, although the lessor in the first action was discharged as an insolvent, while in custody under attachment for non-payment of such costs. *Doe dem. Heighley v. Harland*, 761

2. Effect of attachment for, 761. Ante, I.

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1. What negligence equivalent to, 719. SHERIFF, IX. 2.

2. Suffered by bailiff of liberty, 477. BAILIFF, III. 1.

3. Covinous arrest to fix the marshal with an escape.

In debt against the marshal of Q. B. for an escape of W., a prisoner in custody under a ca. sa. at the suit of plaintiff, defendant pleaded that W. had the privilege of the rules; that L. sued out a capias on mesne process against W.; that L. and plaintiff, well knowing that W. was so privileged, and not legally liable to be arrested out of the rules, "fraudulently, illegally, and covinously combined and conspired" with others to procure W. to be arrested on L.'s writ; and, in pursuance of such fraudulent, &c., caused a sheriff's officer to watch W., to ascertain whether he went beyond the rules, and to arrest him and keep him without the rules if he did; that W., without defendant's consent, went without the rules, and while he was so, and intended to and was about to return within the rules, plaintiff and L., with others in collusion with them, in further pursuance, &c., wrongfully and covinously caused W. to be arrested and conveyed to a place without the rules, and there detained during such time as was required to enable plaintiff to sue defendant for the escape; that, had not W. been so collusively and illegally detained, he could have returned within the rules before the commencement of the suit; that, after the commencement W. returned within the rules, and had been in defendant's custody ever since; and that defendant had no notice of the escape before the commencement of the suit. Replication de injuria, as to all but the allegation that L. sued out and prosecuted his writ, &c., while W. was entitled to the rules.

1. It was proved that U. employed a person to watch for W. and procure his arrest and detention without the rules, at the suit of L., while W. appeared to be intending to return within the rules; and that during the detention, U. went with the attorney's clerk to take out the writ in the action for the escape. The jury, having been satisfied that plaintiff was a party to U.'s proceedings, and the judge having directed a verdict for the plaintiff, this court, on motion, ordered a verdict to be entered for the defendant, on the ground that the jury might infer plaintiff's privity from his adopting U.'s acts by bringing the action, and that such privity proved the issue.

2. But the court granted judgment for the plaintiff, non obstante veredicto, the plea not

showing that W. would have returned within the rules had he not been detained without.

3. The rule for entering the verdict for the defendant having been obtained in the first, and made absolute in the sixth term after the trial, the court, upon making it absolute, granted the rule nisi for judgment non obstante veredicto, considering the case an exception from the rule of Hil. 2 W. 4, I. 65. *Merry v. Chapman*, 516

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2. In permitting a party to deal with goods as owner.

The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bona fide, cannot recover them from the vendee.

G., the owner of the fittings of a public-house, demised them to D., who thereupon became tenant of the house to a third party, under an agreement which gave his landlord a lien on the fittings. G. was present at the execution of such agreement. D. afterwards sold the good-will and fittings, without G.'s knowledge or assent, to W., who, being told by the landlord that D. was his tenant, bought them bona fide, in ignorance of G.'s title, and was accepted by the landlord as tenant in the place of D.

Held, that G. could not maintain trover for the fittings against W., and that the defence was admissible on the plea of *not possessed*. *Gregg v. Wells*, 90

3. By negligence which facilitated a fraud, 437. STOCK.

4. By permitting a delivery to a party as owner.

Defendant brought trover against D. for a dog, and obtained a verdict for 50*l.* damages, subject to be reduced to 1*s.* on the delivery of the dog to defendant. By plaintiff's authority D. delivered the dog to defendant, at the same time demanding it back on behalf of plaintiff, as his property, at a time named. Afterwards, at the time named, plaintiff demanded the dog, and defendant refused to deliver it.

Plaintiff brought trover; defendant traversed plaintiff's property, and also pleaded not guilty, and leave and license. Plaintiff now assigned to the plea of leave and license, to which defendant pleaded not guilty, and leave and license; to which last plea plaintiff replied *de injuriâ*.

Held, that plaintiff was not precluded from proving his title by having authorized the delivery; and that, on proof of title, he was entitled to a verdict on all the above issues. *Sandys v. Hodgson*, 472

5. By treating a warrant as a mandate, 477. BAILIFF, III. 1.

6. By taking advantage of irregularity, 225. SCIRE FACIAS, I.

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9. By public company's assertions in an act obtained by them, 531. RAILWAY, III.

II. By first fault in pleading, 632. PLEA, II. 1.

III. By judgment in ejectment.

Trespass for mesne profits between 10th July, 1826, and the commencement of the suit. Pleas, 1. That plaintiff was not possessed of the premises *modo et formâ*; 2. That the premises were the soil and freehold of defendant during all the time, &c. Replication by way of estoppel, to each plea, that after 10th July, 1826, plaintiff commenced an action of ejectment for recovery of the same premises upon a demise, laid 10th July, 1826, for fourteen years, and a demise laid 26th December, 1831, for seven years, and an ouster on 27th December, 1831, and had judgment to recover his said terms; concluding with a prayer of judgment if the defendant ought, during the said terms, to be admitted, &c.

Held, on general demurrer, that the replication was good.

And that a rejoinder, stating that no writ of execution was ever issued, nor had plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined, was bad.

The plea of *liberum tenementum* admits a sufficient possession of the plaintiff to support an action against a wrongdoer, but denies his rightful possession, and asserts a right to immediate possession in the defendant. *Doe v. Wright*, 763

IV. By sheriff's return, 477. BAILIFF, III. 1. 673, SHERIFF, II. 2.

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1. Apparent on face of plea, 606. WITNESS, I. 2.

2. Incompetency how removed, 606. WITNESS, I. 2.

3. Husbands, liability over.

Trespass for distraining on plaintiff. Plea, that W. held the premises as tenant to defendants, at a rent of 10*l.*; and distress for such rent. Replication, non tenuit.

The case opened for the plaintiff at the trial was, that W. was seised in fee, and that plaintiff held the premises of him at a rent of 3*l.*

Held, that W.'s wife was not a competent witness for plaintiff to prove those facts, because, in the event of a verdict for defendants, W. would be liable over to plaintiff; and that the incompetency, being independent of any use that might be made of the verdict, was not removed by 3 & 4 W. 4, c. 42, s. 26. *Wedgewood v. Hartley*, 619

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5. Orders of commissioners of sewers, 398. SEWERS.
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1. Minute of terms.

A witness, produced to prove a parol demise from plaintiff to defendant, stated that, at the time of making it, plaintiff looked at written minutes, from which he appeared to read the terms to which defendant assented. Held that, in the absence of any further proof respecting the nature of the minutes, parol evidence of the terms of the demise was admissible. *Trewhitt v. Lambert*, 470

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On an issue respecting the boundary of a parish and county, an award in a suit inter alios, in which the arbitrator set out the boundary as proved before him, and a verdict was entered according to his direction, is not admissible as evidence of such boundary.

Although verdicts are, upon authority, admitted as proof of reputation, the rule does not extend to awards.

A presentment in a manor court, setting forth the bounds of a manor, is admissible evidence of such bounds, though part of the document, unconnected with the subject of bounds, has been cut out.

Where an ancient manor book is offered in evidence, the custody must be proved by a sworn witness. It is not enough that the book is produced in court by the counsel or steward of the lord of the manor, nor, as it seems, by the lord of the manor in person. *Evans v. Rees*, 151

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- III. How far bound by act of deceased.**
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- Plaintiffs entered into an agreement with C. to supply him with a certain quantity of slate immediately; with a certain other quantity, monthly, at a fixed price; and with any further quantity, monthly, that C. might require. C. engaged to receive the slate, not exceeding 200 tons per month; and the agreement was to be in force till 1st January, 1838.
- Held, that plaintiff might sue the administrator of C. for refusing to receive slate sent, in pursuance of the contract, after C.'s death,

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Indictment stated that defendant falsely pretended to W. that he, defendant, was a captain in the East India Company's service, and "that a certain promissory note, which he," the defendant, "then and there produced and delivered to" W., "purporting to be made for the payment of the sum of 21*l*." (not saying by whom it purported to be made, nor otherwise describing it), was a good and valuable security for 21*l*.; by which false pretences he obtained, &c. Whereas defendant was not a captain in the company's service, and whereas the said promissory note which he then and there produced and delivered to W., "was not a good and valuable security for the sum of 21*l*., or for any other sum." Verdict, Guilty.

Held, on writ of error, that the indictment did not sufficiently describe the note, or show how it was wanting in value; and that a conviction could not be supported on the representation as to the defendant's character, because the false pretences were so connected on the record, that one could not be separated from the other.

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A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. *Doe dem. Graves v. Wells*, 427

2. Equitable relief.

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Under stat. 5 & 6 W. 4, c. 76, s. 114, the county treasurer may order the council of any borough within the county, having separate quarter sessions, to pay to the county the expenses of prisoners committed from such borough for trial at the assizes, and confined in the county gaol, though such prisoners were committed before trial to the borough gaol, not the county gaol, and were not confined in the county gaol till after the bills against them were found.

And such order may be made without any contract between the borough and county justices.

The expenses are to be estimated by dividing the whole expenses of the gaol according to the number of prisoners and the periods of their confinement, and are not limited to the expenses incurred in respect of the individual prisoners. *Regina v. Johnson*, 740

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I. Requisites.

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3. Consideration.

Declaration in assumpsit, that defendant promised, in consideration that plaintiffs, at his request, would give up to him a certain guarantee of 10,000*l.* on behalf of L., then held by plaintiffs. Averment, that plaintiffs gave up the guarantee, but defendant did not perform his promise. Plea, that the guarantee was a promise to answer for the debt of another, and that there was no agreement,

&c., in writing, wherein any sufficient consideration was stated (according to stat. 29 Car. 2, c. 3, s. 4). And that the supposed guarantee was contained in the following written memorandum, signed by defendant:—"Messrs. H." (the plaintiffs). "In consideration of your being in advance to L. in the sum of 10,000*l*. for the purchase of cotton, I do hereby give you my guarantee for that amount on this behalf. J. B."

Held, by the Court of Queen's Bench, on demurrer, that the words of the guarantee did not necessarily imply a past advance; and that, if they left it even doubtful whether a future advance was not guaranteed, a promise made in consideration of giving it up was valid. But,

Held further, that at all events it appeared on the pleadings that the plaintiffs had delivered something to the defendant, on the faith of his promise, which he at the time considered valuable, and this being so, and no fraud imputed, he could not afterwards excuse a breach of the promise, by alleging that the thing given up was not of the value he had supposed.

Judgment affirmed on error, by the Court of Exchequer Chamber.

Held, by the Court of Error, that the guarantee did not necessarily imply a past advance; and that the plaintiffs, on a trial, might have offered evidence to show that future advances had been contemplated.

Held also, Maule, B., dubitante, that the paper on which the guarantee was written appeared by the declaration and plea to have been given up by plaintiffs to defendant; and that this alone was consideration for a promise.

Held, by the Court of Queen's Bench, that, on the trial of an issue of fact raising the question, whether or not the above guarantee had been delivered up, the guarantee might be given in evidence, though unstamped. *Haigh v. Brooks*, 399

II. Continuation.

The following guarantee was given to the firm of M. and D., the actual members of which at the time were M., D., and N.:—"G. C. is desirous of commencing business in your line, and wants the usual credit for six months: if you think well to supply him, I will be answerable for the amount of 100*l*."

Held, that on N. withdrawing from the firm (which continued under the names of M. and D.), the guarantee ceased; no intention appearing on the instrument that the responsibility should continue after such change in the partnership. *Dry v. Dary*, 30

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I. Effect of assignment on action previously commenced.

To assumpsit for goods sold, &c., it is a good plea in bar of further maintenance, &c., that, after action commenced, plaintiff took the benefit of the Insolvent Debtors' Act, 7 G. 4, c. 57, and assigned to the provisional assignee, whereby plaintiff's right of action vested in such assignee.

Replication to such plea, that, after assignment, the provisional assignee had notice of such suit, and permitted it to continue, until he afterwards (and after the above plea pleaded) assigned to other assignees appointed by the Insolvent Debtors' Court; that such assignees afterwards had notice of the suit, and assented to its being continued for the benefit of the creditors; and that it so continued with their consent and on their behalf by such assignees: Held bad on general demurrer. *Swann v. Sutton*, 623

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- IV. When it must be shown, 635. ASSAULT, II. 699, POOR, XII. 1.
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I. Tenancy, how created.

N., having no title to certain premises, let them by parol, and received rent. Afterwards another claimant, B., demanded the rent; and N., being satisfied with B.'s title, informed his tenant, in B.'s presence, that he had given up the premises to B., who was now the landlord, and that the rent was thenceforth to be paid to B. The tenant acquiesced; and when B. demanded the next quarter's rent, paid part of it on account: Held, that the tenant could not afterwards set up the title of a third claimant who had demanded rent, but had taken no step to eject him, no deception by any of the parties having been suggested. *Hall v. Butler*, 204

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2. Estoppel, 204. Ante, I.

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2. Not of definite term by oral disclaimer, 427. FORFEITURE, I. 1.

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By railway company, 3. COMPENSATION, II. 1.

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LETTERS.

Plaintiff gave defendant notice to produce certain specified letters written by defendant to his partner, and a letter-book kept by him, containing copies of the above letters; and defendant consented to admit copies of the letters, saving just exceptions, &c., and un-

dertook to produce the letter-book in proof of them.

Held, first, that the book when produced by defendant was good secondary evidence against him of the letters specified in the notice: secondly, that, supposing proof of the sending of the letters to be material, the fact of their being transcribed in such a book was evidence of it as against defendant; thirdly, that defendant had no right to read in his own behalf, other letters upon the same subject copied in the same book, but not referred to in those read by the plaintiff.

Held, also, that, although the above letters were written to a partner resident in New South Wales, yet, as there had been proceedings in Chancery between the same parties on the subject of the action six years before the trial, in the course of which the letters had been referred to, the court would presume that they had been remitted to England, and that three days' notice to produce them was therefore sufficient.

Held also, that, the object of the evidence being to prove admissions by defendant, the transcripts in the book, made by the defendant or by his authority, were alone sufficient for that purpose, without proving or giving notice to produce the originals. *Sturge v. Bickman*, 593

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Of not negotiable note, §16. BILLS, V.

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- I. Separate, 47. *BARON AND FEME*, III.
 II. Of wife's children, 417. *POOR*, IX. 2.
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2. Notwithstanding another remedy, 531. *RAILWAY*, III.

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2. To proceed on a plaint when the court has proceeded to judgment though erroneous, 248. *Post*, IV. 3.
3. Where the Court of Chancery is better able to deal with the question, 272. *STATUTE*, XXII.

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1. In compensation cases. *COMPENSATION*.
2. To insert names on burgess roll, 66. *STATUTE*, XXXIV. 1.
3. To lord of manor to proceed on plaint, 248. *Post*, IV. 3.
4. To lord of manor to accept surrender, 272. *STATUTE*, XXII.
5. To hear appeal, 685. *POOR*, X. 8.
6. To levy church-rate, 730. *CHURCH-RATE*.
7. To parish officers to pay to treasurer of union, 736. *POOR*, II. 1.

IV. Return.

1. Impossibility, 531. *RAILWAY*, III.
2. Particularity in, 736. *POOR*, II. 1.
3. Of variety of causes, when not bad.

Mandamus to the lord and steward of the manor of O. recited that, at a manor court holden before the steward in May, a plaint in the nature of a writ of right, according to the custom, &c., was presented to the steward, received by him, and enrolled in the court rolls: that at a court holden in August, the demandant and tenant appeared, but that the steward refused to proceed upon the plaint; and the mandamus commanded the lord and the steward to proceed on the said plaint.

Return, that at the court of August the tenant objected to the making the plaint, as erroneous and irregular on two grounds; whereupon it was considered and ordered by the court that, for those errors, the plaint and proceedings should be set aside, reversed, annulled, and altogether held for nothing; and that the court would take no further cognisance thereof; and thereupon the plaint and proceedings were set aside, &c.: that, notwithstanding, a court was holden, in obedience to the mandamus, in the October following the issuing of the mandamus, whereat the tenant contended that, for the former objections and another, the plaint presented in May was erroneous and irregular; and upon those grounds, and because of the judgment of the court in August, he prayed that the

plaint might be held for nothing, and that the court would take no further cognisance thereof whereupon it appeared to the court that there was error in the plaint and proceedings, and that the court ought not to take cognisance or proceed thereon; and it was considered and adjudged that the plaint and proceedings were rightly set aside at the court of August, and that the court ought not to take further cognisance thereof.

Upon objection that the return was contradictory and repugnant, as showing that the court proceeded in October upon a plaint already annulled, and that there was no judgment set forth:

Held, that the return was good, inasmuch as there was no contradiction, and that the court appeared to have adjudged; and this court, upon the present proceeding, could not inquire whether or not the adjudication was erroneous or informal. *Regina v. Old Hall*, 248

4. When quashed on motion, 736. *POOR*, II. 1.

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MARRIAGE.

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The summary remedy given by stats. 2 G. 2, c. 22, s. 6, and 32 G. 2, c. 28, s. 11, to a prisoner for an abuse committed by a gaoler, &c., in his office, is cumulative; therefore the court will not stay proceedings in an action of trespass commenced by a prisoner for such abuse.

But *semble*, if the prisoner resorts to his summary remedy, and obtains the decision of the court thereon, he will not be permitted afterwards to bring an action for the same cause. *Yorke v. Chapman*, 207

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- II. Settlement, 693. *POOR*, XII. 4.

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- II. Effect of writ of error on the judgment in ejectment, 763. ESTOPPEL, III.
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- II. Of real owner, 90. ESTOPPEL, I. 2.

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- II. Effect of acquiescence and payment of rent by, 204. LANDLORD AND TENANT, I.
- III. When not remediable by mandamus, 179. STATUTE, XXXIV. 4.
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2. Grounds of dismissal, 374. STATUTE, XXXIV. 5.
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Where a clause in a statute (50 G. 3, c. cxlix. s. 105, local and personal, public) required thirty days' notice of action for anything done in pursuance of it, and enabled the party complained of to tender amends for any irregularity: Held, that a letter written to the defendant, who justified under the act, requesting him to communicate the names of certain parties, and stating that, unless the request was complied with, the plaintiff would "take proceedings against him accordingly," was not a sufficient notice within the statute.

The act authorized trustees, upon complaint of any inhabitant, and "due investigation," to order "any pigstye, necessary, or nuisance," in or near the streets, &c., to be removed within seven days after notice in writing to the occupier of the premises wherein such nuisance was situate. The trustees issued such a notice to the plaintiff, imputing that he kept a brothel, and ordering him to discontinue such nuisance. Plaintiff thereupon brought an action, as for a libel, against the clerk who signed the notice: Held, that he was entitled to notice of action under the above clause, although it did not appear that there had been either complaint or investigation before the issuing of the order.

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The directors of a private company formed under a deed of settlement, sued upon a contract made with themselves as directors. On the trial it appeared that there was another director, not named as plaintiff, who had become bankrupt, and had ceased and declined to act, or attend the board of directors, when the contract was made.

Held (on non assumpsit), that the plaintiffs ought to have produced the deed to show that they had authority, in the character of direc-

tors, to sue for the company and also to show that the office of director was determined by bankruptcy, or by voluntarily ceasing to act. *Phelps v. Lyle*, 113

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2. When bad after verdict.

In indebitatus assumpsit for various debts, amounting in the whole to 500*l.*, the declaration admitted payment of 158*l.* on account, and alleged that the residue remained unpaid, to plaintiff's damage of 200*l.* Plea, as to the said residue, that defendant paid, and plaintiff accepted, 6*l.* 10*s.* in full satisfaction thereof, and of all causes of action in respect thereof. The replication denied the payment in satisfaction, and, upon issue joined, the jury found for defendant.

Held, that the plea, alleging the acceptance of a less in satisfaction of a larger sum, was bad after verdict; and that plaintiff was entitled to judgment non obstante veredicto. *Down v. Hatcher*, 121

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Debt for penalties under stat. 22 G. 2, c. 46, s. 14, for acting as attorney at the sessions of the peace where defendant "executed the office" of deputy clerk of the peace. Plea, Not guilty. Held, that plaintiff was bound, upon this issue, to prove the actual exercise of the office by defendant; and that a finding by the jury that defendant "had never acted" as such deputy, negatived the charge in the declaration.

The town clerk, to whose office that of clerk of the peace had usually been incident, appointed defendant his deputy in the office of town clerk. Held, that, for the purpose of this action, defendant was not deputy clerk of the peace; and *semble*, that even if the appointment made him such deputy, he was not liable to the penalties if he abstained from acting, and the duties of clerk of the peace were always performed by the principal in person. *Faulkner v. Chevell*, 78

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1. When not set aside.

In an action by endorsee against acceptor, defendant pleaded that he had no notice of the endorsement; that he did not promise to pay; and that plaintiff had not paid the whole consideration. The Court refused to set aside the plea as a nullity upon motion.

Where a plea is clearly frivolous, the Court will set it aside, although the defendant is not under terms to plead issuably. *Horne v. Keppel*, 17

2. When set aside.

Action on two bills of exchange by endorsee against acceptor. Plea, as to one bill, no consideration between drawer and defendant; as to the other, no consideration paid by plaintiff to defendant. The Court set aside the pleas with costs, and allowed plaintiff to sign judgment, though defendant was not under terms. *Knowles v. Burward*, 19

3. When treated as a nullity.

Debt on bond against A. and B. Defendant A., being under terms to plead issuably, pleaded that plaintiff ought not further to maintain his action, because defendants were in partnership as attorneys, and, after the commencement of the suit, in consideration that defendant A., at the request of plaintiff and of defendant B., would dissolve partnership, plaintiff agreed to forbear all further proceedings in the action; and the partnership was dissolved accordingly. Plaintiff signed judgment as for want of a plea. On motion to set aside the judgment, the Court discharged the rule with costs. *Blackburn v. Edwards*, 21

II. Defects.

1. Bad in part when bad altogether.

Debt for goods sold and delivered, money had and received, and on an account stated. Plea, nil debet (pleaded before Reg. Gen. Trin. 1 Vict. requiring the words "by statute"). Special demurrer. Held that, since the new rules of pleading, the plea could, under no circumstances, be good as to the last count; and that, being pleaded to the whole declaration, it was bad for the whole. *Calvert v. Mogg*, 632

2. Amounting to general issue.

Assumpsit for money paid. Plea, that the money was paid by plaintiff as agent for defendant, in the purchase of railway shares; that plaintiff thereupon received certificates of the title of said shares, and ought to have

delivered them to defendant, but refused to do so, and afterwards wrongfully converted them to his own use, whereby the shares and certificates became lost to defendant: Held, that the plea was bad, inasmuch as it either amounted to the general issue, or alleged matter that was no avoidance of the contract, but only a ground of cross-action. *Francis v. Baker*, 642

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3. By plea of lib. ten., 763. **ESTOPPEL, III.**
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XVIII. Surplusage.

When it may be rejected.

Assumpsit on a promissory note by endorsee against maker. Plea, that it was delivered by defendant to the endorser J., to enable him to take up a former note, also made payable by defendant to J., for the accommodation of J., and by him endorsed to plaintiff; and that, after the note declared on became due, the amount was paid to plaintiff by defendant. Replication, de injuria generally.

Held, that the averment, introductory to the payment of the last mentioned note, might be rejected as surplusage; that the payment only need be proved; and that such payment might be shown without producing the note itself.

Held also, that, in an action by plaintiff on the first note, a verdict and judgment for defendant on the above issue would not be pleadable in bar, nor evidence of any immaterial statements in the plea; for that the replication only put in issue material allegations. *Shearn v. Burnard*, 593

XIX. In particular cases. See ESCAPE, MESNE PROFITS, PARLIAMENT, SHERIFF, STOCK.

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I. Poor Law Commissioners. Indictment for not accounting pursuant to their rules, 132. Post, III.

II. Government by board of guardians.

1. Appointment how disputed on return to mandamus.

Mandamus to the officers of a parish included in a union (formed under 4 & 5 W. 4, c. 76, s. 26), reciting the due appointment of certain persons to be guardians of the poor of the union, and directing them to pay a sum, out of the poor-rates collected by them, to the treasurer of the union. Return, that

the said supposed guardians were not, nor were any of them, duly appointed under the provisions of the act, &c.; and that, at the issuing of said writ, the said supposed guardians therein mentioned were not, nor were any of them, guardians of the poor of the said union.

Held, that the return was insufficient for not distinctly setting forth any defect in the appointment; and the return was quashed on motion, and a peremptory mandamus awarded. *Regina v. St. Andrew and St. George*, 736

2. Signature of notice of filiation, 423. **Post, XVI.**

3. Auditor, 132. **Post, III.**

III. Overseers' accounts.

An indictment against overseers on sect. 47, of stat. 4 & 5 W. 4, c. 76, for not accounting to the auditor of a union, upon request, on a day appointed by him, is bad unless it appear that there was some rule, order, or regulation of the commissioners that the overseers should account upon such request.

Where no such order, &c., is alleged, the indictment cannot be sustained after verdict, merely because it appears, by inference, or the inducement, that defendants have not in fact accounted for one whole quarter.

Upon such indictment it is sufficient, at least after verdict, to allege the order to have been made by "the Poor Law Commissioners for England and Wales," without naming each commissioner; and to state that a copy of the order under seal, &c., was "duly sent" to the overseers, without alleging actual service of it on them. Per Lord Denman, C. J., and Patteson, J.

Quere, whether disobedience of an order of the commissioners to account be indictable under sect. 98, before the third offence? *Regina v. Crossley*, 132

IV. Property rateable.

1. Stock in trade.

The parochial assessment act, 6 & 7 W. 4, c. 96, does not alter the law as to the rateability of personal property; therefore a poor-rate made after the statute, omitting stock in trade which yields a profit in the parish, is liable to be quashed on appeal. *Regina v. Lumadaine*, 157

See also, 711, **Post, VI., 1**, and the temporary act, 3 & 4 Vict. c. 89.

2. Union workhouse.

The guardians of an union formed under stat. 4 & 5 W. 4, c. 76, s. 26, comprehending the parish of M. and others, built a workhouse in M. for the employment of the poor, under 4 & 5 W. 4, c. 76, s. 23.

Held, that the guardians were rateable in the parish of M., as occupiers of the workhouse. *Regina v. Wallingford Union*, 259

V. Payment of rates.

1. By third party without authority, 66. **STATUTE, XXXIV. 1.**

2. Settlement by, how described, 682. **Post, XII. 3.**

VI. Appeal against rate.

1. Jurisdiction.

Before the passing of stat. 5 & 6 W. 4, c. 76, (Municipal Corporation Act), the borough of B. had a quarter session and four justices,

but no non-intromittant clause. The parish of B. was wholly within the jurisdiction of the borough justices, though part only was within the borough; and both parish and borough were within the county of S. By the operation of that act, part only of the parish was included within the new boundary of the borough, and neither the recorder nor the borough justices had any jurisdiction over the rest of the parish. Since that act there were separate quarter sessions and seven justices for the borough. The overseers of the parish made one poor-rate for the whole, which was duly allowed by justices, both of the county and borough. An inhabitant and occupier of land in the part out of the borough appealed against the rate, on the ground that certain inhabitants of the part within the borough were not rated in respect of stock in trade.

Held, that the county sessions had jurisdiction to try the appeal, and to amend the rate by inserting the stock in trade; for that the county justices had jurisdiction by virtue of 1 G. 4, c. 36, before the passing of stat. 5 & 6 W. 4, c. 76; and sect. 111 of the latter act excludes their jurisdiction only where the borough was before exempt from it. *Regina v. Bridgewater*, 711

2. See also Post, XIII.—XIV.

VII. Settlement by renting a tenement.

1. How described, 682, 688. Post, X. 8, XII. 3.

2. Value.

A case from the quarter sessions stated that, the justices being equally divided in opinion, the chairman gave a casting vote in favour of the order, which was confirmed accordingly; that on the following day the appellants' counsel protested against the legality of the decision; that "the question" was then argued on both sides; and that the justices then present "determined to adhere to" the former decision: Held, that, although the proceeding on the first day was irregular, this Court would not assume that the decision on the second day was not a judgment upon the merits.

Pauper rented a cottage and premises, including a ferry with the use of a boat and line, across an adjoining river. The premises, without the ferry, were not worth 10*l.* a year. Held, that the ferry might be included in order to make up the necessary value; and that, supposing the boat and line to be distinct personal chattels, the Court would not presume that the value of the tenement would be insufficient without them, upon a case reserved which did not show such insufficiency. *Regina v. Fladbury*, 706

3. Joint occupation.

A settlement cannot be gained under 6 G. 4, c. 57, by renting and occupying a tenement jointly with another person. *Regina v. Caverswall*, 270

4. Variance, 685. Post, X. 8.

VIII. Settlement by hiring and service.

How described, 693. Post, XII. 4.

IX. Removal.

1. On what evidence, 699. Post, XII. 1.

2. Of children.

A man having, in 1836, married a widow with children by her first husband, ran away

and left them chargeable to the parish. Held, that the children above the age of nurture might, notwithstanding stat. 4 & 5 W. 4, c. 76, s. 57, be removed from their mother to the place of her first husband's settlement, though they were under the age of sixteen.

Where a child, within the age of nurture, is removed from its mother, and that fact appears upon the face of the order and in the special case, yet the Court of Queen's Bench will confirm it, unless the objection was relied upon in the notice of the grounds of appeal. *Regina v. Stafford*, 417

X. The copy of the examinations.

1. What to be sent.

On appeal against an order of removal, it is a good objection that the copy of examination, sent to the appellants under 4 & 5 W. 4, c. 76, s. 79, does not show that the pauper was chargeable. *Regina v. Black Callerton*, 679

2. Must show jurisdiction, 699. Post, XII. 1.

3. Construction, 685. Post, 8.

4. Particularity in identification of premises, 682. Post, XII. 3.

5. Particularity in circumstances essential to the settlement.

A copy of examination, furnished under stat. 4 & 5 W. 4, c. 76, s. 79, on removal of a pauper, does not give sufficient information of the settlement relied upon, if it merely state that the party gained a settlement by renting and occupying a tenement of J. T. (naming the landlord) in the township, &c., (to which the pauper is removed), of the yearly rent of 10*l.*; no time being specified.

And, on appeal, the appellants may take advantage of such defect, though their notice of grounds of appeal state only that the order of removal, examination, and notice of chargeability, are bad upon the faces thereof. *Regina v. Middleton in Teedale*, 688

6. Particularity as to time, 693. Post, XII. 4.

7. Ignorance, how far an excuse, 693. Post, XII. 4.

8. Variance.

Where the pauper's examination differs from his evidence at sessions, as to any circumstance making a part of the matter pointed to in the statement of grounds of appeal, it is for the sessions to decide whether the variance be material within stat. 4 & 5 W. 4, c. 76, s. 81.

So held, on application for a mandamus to enter continuances and hear an appeal.

Per Lord Denman, C. J. The examination of the pauper is to be construed as strictly as the statement of grounds of appeal. *Regina v. West Riding Justices*, 685

XI. Appeal against order.

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XII. Grounds of appeal.

1. Objections to evidence given on the examination.

The copy of examinations transmitted with an order of removal under stat. 4 & 5 W. 4, c. 76, s. 79, must show, on the face of it, every fact necessary to give the justices jurisdiction to remove.

Where the examination shows all such particulars, and discloses no irregularity, it cannot be objected, on appeal, that the evi-

dence was in fact inadmissible, if the objection was not made known to the justices at the examination.

Where an order of removal had been made upon the examination, regular on the face of it, of T. B., which was transmitted according to stat. 4 & 5 W. 4, c. 76, s. 79, and, on appeal, the appellants offered to prove that T. B., when examined, was a convicted felon: Held, that such evidence was irrelevant if offered as impeaching the examination. *Regina v. Altermun*, 699

2. Objections on the face of the order, 417, 688. Ante, IX. 2, X. 5.

3. Particularity in identification.

A notice of appeal under stat. 4 & 5 W. 4, c. 76, s. 81, alleging as the ground a settlement in another parish, T., is bad if it merely states that the pauper, in or about 1830, paid parochial taxes for a tenement in the parish of T. rented by him at 11*l.* a year, for the term of one year, and occupied by him under such hiring for one year, the rent, to the amount of 15*l.*, being paid by him; and that the pauper rented the *aforesaid* tenement (not describing it further), at 15*l.* a year, and occupied under that hiring for one year, and paid 10*l.* rent. The premises should be further described by giving, at any rate, the landlord's name. *Regina v. East Sussex Justices*, 682

See also, 688. Ante, X. 5.

4. Particularity as to time.

In a notice of appeal under stat. 4 & 5 W. 4, c. 76, s. 81, against an order of removal, alleging, as the ground of appeal, a settlement by hiring and service, the general rule is, that the date of the service, as well as the master's name, should be stated; and that a notice omitting such date is bad. If it appear that the appellants could not ascertain it, *semble*, per Lord Denman, C. J., and Little-*dale*, J., that the strict rule may be dispensed with.

Per Lord Denman, C. J., and Coleridge, J.: the sessions may judge whether, under the circumstances of any particular case, time is so material that the omission to specify it vitiates an examination or notice of appeal. *Regina v. Bridgewater*, 693

5. Ignorance, 693. Ante, 4.

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1. Competency, 699. Ante, XII. 1.

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XVI. Bastardy.

The notice of an application for an order in bastardy under stat. 4 & 5 W. 4, c. 76, s. 73, signed by the churchwardens and overseers of the parish, is sufficient, though the parish is part of a union under sect. 26 of the Poor Law Amendment Act, and none of the guardians have signed it. *Regina v. James*, 423

XVII. Wife's children, 417. Ante, IX. 2.

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By a railway act (6 & 7 W. 4, c. cvi., local and personal, public) it was recited that the making a railway from London to Norwich and Yarmouth, passing by Colchester, &c., would be of great public advantage; and that persons named were willing at their own costs to carry the undertaking into execution. The persons named, with other shareholders, were incorporated into a company to carry the act into execution. They were authorized to raise by shares 1,600,000*l.* (which, it was recited, was the probable expense); and, in case that sum should not be sufficient, to borrow on mortgage, or raise by additional shares, 533,333*l.* The line was set out in the act, describing the places from London through Middlesex, Essex, Suffolk, and Norfolk, with two termini, one at Norwich, the other at Yarmouth. The usual powers to take lands were conferred, with power to deviate from the line to a limited extent. All the 1,600,000*l.* was to be subscribed for before the company could exercise their compulsory powers; and these powers were to cease unless executed within two years; and, if the whole work was not completed in seven years (unless prevented by inevitable accident), all their powers were to cease, except as to the part (if any) completed. If any part was abandoned, the lands were, as to that part, to vest in the owners of the lands adjoining.

By a second act, 1 & 2 Vict. c. lxxxi., (local and personal, public,) two years more were added to the first two years: and the company were forbidden to deviate, unless the line of deviation were set out within one year from the passing of the last act.

On application for a mandamus to the company to proceed with the whole line, setting out deviations, &c., and to purchase the necessary lands, it appearing to the Court that the affidavits showed reasonable ground for believing that the company intended to complete the line from London to Colchester only, and to abandon the rest, the writ was granted, though the company stated that they had not, nor could raise without a new act, funds sufficient to complete the line.

The mandamus suggested that the company had been required to define the deviations, and complete the railway to Norwich and Yarmouth, but that they had refused and neglected to purchase the necessary lands between Colchester and Norwich, and Norwich and Yarmouth, or set out the deviations, or to make and complete the railway. There was no averment that the company had abandoned the design, or were not proceeding with all convenient speed, or that a reasonable time had elapsed without proper preparations, or that deviations would be expedient.

Held, that the mandamus was insufficient.

When cause is shown against a rule for a mandamus, the objection, that no sufficient demand and refusal appear, must be taken before the merits are discussed. *Regina v. Eastern Counties Railway Company*, 531.

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- II. Amendment.
To *scire facias* by the assignees of a bankrupt on a judgment, the defendant pleaded, 1. denial of the bankruptcy; 2. satisfaction to the bankrupt; on which pleas, issues were joined. The Court permitted the proceedings to be amended on payment of costs, by joining the official assignee (who had been inadvertently omitted as a co-plaintiff,) though the application had been delayed a year and a half after the issuing of the writ, the defendant being allowed to plead *de novo*. *Holland v. Phillips*, 149
- III. When necessary, 570. *ARREST*, V. 1.

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- Repair of sea walls: evidence.

A landowner may be liable, by prescription, to repair sea walls, though destroyed by extraordinary tempest. And therefore, on presentment against such owner, for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist ordinary weather and tides: but it is a question to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also.

Orders of the commissioners of sewers, requiring landowners to repair and alter sea walls, may be given in evidence as adjudications, by a court of competent jurisdiction, without proof of their having been acted upon. After a considerable lapse of time (as seventy years,) the Court will presume that such orders were executed. *Regina v. Leigh*, 398

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- I. His precept.
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- II. His return.
1. When no estoppel, 477. *BAILIFF*, III. 1.
2. Effect of taking out of court the amount levied.
Where the sheriff on a *fi. fa.* returns that he has levied part of the debt, and that the debtor has no goods whereof the residue can be levied; and the creditor accepts the amount levied on account, and towards payment of his debt; he is not thereby precluded from bringing an action against the sheriff for a false return. *Holmes v. Clifton*, 673
- III. His officer. *BAILIFF*.
- IV. Arrest. *ARREST*.
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- VI. His fees, 494. *BAILIFF*, II. 3.
- VII. His liabilities.
1. For neglect to arrest, 719. *Post*, IX. 2.
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- VIII. Interpleader, 145. *COSTS*, III.
- IX. 1. Pleading and evidence, 23. *ARREST*, IV. 4.

2. In action, for neglect to arrest.

Under stat. 2 W. 4, c. 39, (and see stat. 1 & 2 Vict. c. 110, s. 3, and sched. No. 1,) it was the duty of the sheriff executing a writ of capias to arrest on the first opportunity, and an action lay against him for default made before the return day of the writ, provided some actual damage resulted to the plaintiff; not otherwise. In a declaration for such default, it was not a sufficient allegation of damage to state that defendant did not arrest, &c., and wilfully neglected opportunities of doing so, and that the debtor did not put in special bail according to the exigency of the writ, whereby plaintiff was delayed in the recovery of his debt, and is likely to lose the same. But an averment that the sheriff was in default after the writ was returnable, would have implied legal damage.

Semble, that, on special demurrer, such declaration would have been bad for not averring that the sheriff had been in default more than eight days before the commencement of the suit: but that, on general demurrer, it was sufficient if the count alleged that the debtor had not put in special bail according to the exigency of the writ.

The declaration ought to have stated that the writ was delivered to the sheriff within four calendar months from the issuing; but, *semble*, the omission of such statement was matter of special demurrer. *Randell v. Wheble*, 719

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III. Bills for undertakings by public companies.

1. Concealment from legislature.

An agreement under seal, between plaintiff and defendants, recited: That a company had been formed for making a railway; that defendants were proprietors; that a bill had been introduced into parliament, according to which the line would pass through plain-

tiff's estates and near his mansion, and that he was a dissentient and opposed the passing of the bill; that defendants had proposed that if he would withdraw his opposition, and assent to the railway, they would endeavour to deviate the proposed line: and plaintiff agreed that, on condition of the stipulation in the agreement being performed, he should thereby withdraw his opposition and give his assent: and defendants covenanted that, in case the then bill should be passed in the then session, they would, in six months after it received the royal assent, pay plaintiff 5000*l.* as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of, and without prejudice to, further compensation to plaintiff in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation for any damage as in the agreement after mentioned.

Plaintiff declared in debt, and averred that he withdrew his opposition to the bill, which passed into a law in the then session; that six months had since elapsed, but that defendants had not paid the 5000*l.*

Plea, that the railway, at the time of making the agreement, and according to the act, was intended to pass through lands of divers individuals; that the agreement was made privately and secretly by the parties thereto, without the consent or knowledge of the said individuals, and was concealed from them continually until the act was passed, and was not disclosed to, or known in, parliament, and was concealed from the legislature during the passing of the act; and that plaintiff, at the time of passing the act, and still, was a peer of parliament. On demurrer,

1. Held, in Q. B., that the plea was good, as showing that the contract was a fraud on the legislature.

Judgment reversed in the Exchequer Chamber, because the record did not distinctly show that the parties, at the time of the contract, intended it to be concealed. Quære, whether, if such intention had been shown, the plea would have been good?

Held also, in the Exchequer Chamber, 2. That no fraud on the individual landholders appeared, it not being distinctly shown that concealment from them was intended at the time of the contract. *Semble*, that even if this had appeared, there was no fraud on the landholders.

3. That the agreement was not bad on the ground of plaintiff being a peer, since it was not shown that the money was promised as a consideration for his vote being given or withheld, and he had a right in his individual character to bargain for compensation for injury to his land. But that, if it had appeared that the money was so given, the action would have failed.

Defendants also pleaded that, after making the agreement and before action brought the company abandoned the deviated line, and in lieu thereof adopted another line, altogether out of plaintiff's lands; that they had petitioned parliament to be allowed to carry the railway along the new line, and were then making every exertion in their power to procure an act for that purpose; and that if they should obtain such act, no part of the railway would pass through plaintiff's lands.

4. Held, in *Q. B.*, on demurrer, that the plea was no answer. *Houden (Lord) v. Simpson*, 793.

2. Concealment from other parties, 793. Ante, 1.

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1. Sec. 4. Interest in land, 753. VENDORS, II. 3.
2. Sec. 4. Guarantee, 309. GUARANTEE, I. 3.
3. Sec. 4. Default of another.

If plaintiff become bail for a stranger, in consideration of defendant's request, and of defendant promising to indemnify plaintiff against the consequences, no action lies upon such promise unless it be in writing, under stat. 29 C. 2, c. 3, s. 4. *Green v. Crosswell*, 453.

See also, 460. BILLS, II.

4. Sec. 17. Oral variation.

Declaration, in *assumpsit*, stated that plaintiff agreed to buy, and defendant to sell, a cargo to be delivered "on the 20th to the 22d instant," to be paid for by acceptance three months from delivery; and that afterwards, before the 22d, plaintiff, at request of defendant, gave time for the delivery to the 24th; breach, that defendant, though requested (to wit, on 24th) to deliver, had not, on 24th or any other time, delivered; special damage by rise of price between the agreement and breach. Plea, that the giving of time was part of a contract for the sale of goods at the price of above 10*l.*; and that there was no part acceptance, or earnest, or note or memorandum in writing. Replication, that the giving of time was not part of the contract, &c.

It appeared that there was a written contract, as stated in the declaration, for the delivery "on the 20th to the 22d;" but, the 22d falling on Sunday, plaintiff, at defendant's request, verbally agreed to enlarge the time to the 23d or 24th. The price fluctuated between the time of the agreement and the 24th, being higher on the last day. It was understood that the enlargement of time would postpone the delivery of the three months' acceptance.

Held, that on these facts, defendant, under stat. 29 Car. 2, c. 3, s. 17, was entitled to the verdict, the enlargement of time having materially varied the contract, substituting for it a new contract on a similar consideration, and not being merely a dispensation from performance on a particular day. *Stead v. Dawber*, 57.

5. Sec. 17. Sale and resale: delivery, 499. VENDORS, III. 2.

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Sec. 2. Number of appraisers, 640. DISTRESS, II.

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XII. 53 G. 3, c. 127. (Ecclesiastical Courts.)

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XX. 9 G. 4, c. 17. (Sacramental test.)

Secs. 2, 3, 4. Declaration when to be made, 335. DECLARATION, III.

XXI. 9 G. 4, c. 31. (Offences against the person.)

Sec. 27. Certificate of dismissal, 635. ASSAULT, II.

XXII. 11 G. 4 and 1 W. 4, c. 60. (Conveyance of estates vested in trustees.)

Sec. 8. When the *Q. B.* will not interfere by mandamus.

Under stat. 11 G. 4 and W. 4, c. 60, s. 8, the Court of Chancery, upon the Master's report, made an order declaring that the heir of W., legal tenant in fee of copyhold premises, could not be found, that W. held as trustee, and that B. was entitled to the equitable fee; and appointing G. trustee to convey or surrender the legal estate.

This Court refused to compel the lord, by mandamus, to accept G.'s surrender, on the ground that (assuming the statutes to apply to copyholds) the Court of Chancery could compel the performance of whatever was requisite, and was better able than this Court to regulate the rights of the parties.

Especially as it appeared that B.'s right was disputed, and that the lord seized quousque and assigned for a valuable consideration. *Regina v. Pitt*, 272

XXIII. 11 G. 4 and 1 W. 4, c. 64. (Sale of beer.)

Sec. 14. Form of conviction, 11. CONVICTION.

XXIV. 2 W. 4, c. 39. (Process.)

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XXIX. 3 & 4 W. 4, c. 67. (Process.)

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2. Secs. 26, 73. Signature of notice of affiliation, 423. POOR, XVI.

3. Sec. 26. Appointment of guardians, 736. POOR, II. 1.

4. Sec. 47. Indictment for not accounting, 132. POOR, III.

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6. Sec. 79. Copy examination, 679. POOR, X. 1.

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8. Sec. 81. Particularity, 682, 688, 693. POOR, X. XII.

9. Sec. 81. Variance, 685. POOR, X. 3.

XXXII. 4 & 5 W. 4, c. 85. (Sale of beer.)

Form of conviction, 11. CONVICTION.

XXXIII. 5 & 6 W. 4, c. 56. (Highways.)

Sec. 109. General issue, 632. PLEA, II. 1.

XXXIV. 5 & 6 W. 4, c. 76. (Municipal corporations.)

1. Sec. 9. Payment of rates.

Payment of rates, to entitle a person to be put on the burgess list of a borough, under stat. 5 & 6 W. 4, c. 76, s. 9, must be a payment by the party's own act. It is not sufficient that another person, without his authority, pays the rates for him.

Where a party, required by law to pronounce a decision on certain points, is brought before the Court by a motion impugning such decision, the general rule is, that he shall have costs if the application fails.

Per LITTLEDALE, J. It is not regular to grant a single rule nisi for the issuing of several writs of mandamus. *Regina v. Bridgworth, Mayor*, 46

2. Sec. 25. Election of aldermen.

Where a given number of aldermen was to be elected on a given day, under stat. 5 & 6 W. 4, c. 76, s. 25, which prescribed no particular mode of electing (see now stat. 7 W. 4 and 1 Vict. c. 78, s. 14,) the proper mode was to put to the vote a list containing as many names as there were vacancies to be filled up, any elector being at liberty to propose and have put to the vote a list of his own. *Regina v. Brightwell*, 171

3. Sec. 66. Jurisdiction of Lords of Treasury.

Where a party removed from a borough office under stat. 5 & 6 W. 4, c. 76, re-appointed, and afterwards dismissed, applied to the town council for compensation, which is refused, and he thereupon appeals to the Lords of the Treasury under sec. 66 of the statute, the Lords have no jurisdiction to inquire whether he was or was not removed for a sufficient cause within that section.

And therefore, where the council had refused compensation, and the Lords on appeal under sect. 66, and on inquiry into the facts leading to the dismissal, confirmed such refusal, this Court, on affidavits satisfactory to them, granted a mandamus, calling on the corporation to assess compensation, notwithstanding the judgment of the Lords. *Regina v. Warwick Corporation*, 336

4. Sec. 66. Mandamus when refused.

The "common clerk" of a borough, before 5 & 6 W. 4, c. 76, (Municipal Corporation Act,) had always executed, by himself or deputy, the offices of clerk of the peace and clerk of the justices, as incidental to that of common clerk. The first town council, elected after that act, appointed him to the office of "town clerk," which he declined to accept, on the ground that the office was essentially a different one; and he claimed compensation as upon a loss of the entire office of common clerk. The council refused any compensation; and the Lords of the Treasury, on appeal and hearing of all parties, decided that, as he was re-elected town clerk, he was not entitled to compensation for such part of his emoluments as appertained to that office; but, as he was not re-elected to the offices of clerk of the peace or clerk of the magistrates, he was entitled to compensation for the emoluments of the common clerk acting as clerk of the peace and to the justices; and they awarded to him an annuity "for the loss of his office of common clerk." Held, that the Lords had sufficiently adjudicated on the whole subject of appeal; and the Court refused a mandamus to them to hear and determine the merits of it.

If the Lords have in fact heard and determined an appeal under sec. 66 of the act, this Court will not interfere by mandamus, though it may be satisfied that compensation has been awarded on an erroneous principle. *Regina v. Lords of the Treasury*, 179

5. Mandamus when refused.

A town clerk who was in office at the passing of stat. 5 & 6 W. 4, c. 76, but who had been re-appointed afterwards, and subsequently dismissed by the council, applied for compensation, which the council refused. He then appealed to the Lords of the Treasury by memorial, and prayed therein to be heard by himself, his counsel, agents, or witnesses.

The council sent in a memorial in answer, and the town clerk another in reply. The council, in their memorial, alleged that they had dismissed him for conduct which, they stated, warranted removal. This the town clerk denied. The Lords of the Treasury, without hearing the parties further than by taking the memorials into consideration, awarded that the town clerk was entitled to no compensation; stating as their reason, that they thought the council had made the removal in the bona fide and justifiable exercise of the discretion vested in them. On application for a mandamus to the Lords, commanding them to hear the appeal,

Held, that it could not be granted; for that, if the lords had jurisdiction (and *semble*, that they had not,) they had already heard and decided.

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Secs. 1, 2, 3. Rateability of personal property, 157. Poor, IV. 1.

XXXVI. 7 W. 4 & 1 Vict. c. 78. (Municipal corporations.)

Sec. 44. Certiorari.

A town council ordered a payment from the borough fund, for defraying the expenses of opposing two rules, one for a quo warranto against a party who had been declared duly elected a councillor, and had accepted the office, for exercising that office; the other for a criminal information against an alderman of the borough, for alleged misconduct at an election of councillors.

The payments were made by the treasurer, and his accounts audited. Afterwards, stat. 7 W. 4 & 1 Vict. c. 78, passed.

The Court, under sect. 44, upon the affidavit of a burgess, who applied in pursuance of the instructions of a subsequent town council, granted a certiorari to bring up the orders of the previous town council and quashed them. *Regina v. Bridgewater, (Mayor, &c.,* 281

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Held, that the facts were a defence on the plea of not guilty.

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In a suit for subtraction of tithes in the Spiritual Court by an improprator, defend-

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Defendant also put in a responsive allegation, that by immemorial usage, custom, prescription, the tithes were deemed small vicarial, and, as such, due to the vicar, and not to plaintiff.

Plaintiff's personal answer denied the same as stated by defendant; and the judge assigned a day to hear on the sufficiency of plaintiff's answer; and term probate.

Held that, in this stage of the cause, there was no issue on the lease; that the only matter in issue, viz., the immemorial right of the vicar, was properly cognisable by the Spiritual Court; and that there was no ground for prohibition. *Beauchamp (Earl) v. Turner*, 21.

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1. Trespass is the proper remedy for wrongfully continuing a building on plaintiff's land, for the erection of which plaintiff has already recovered compensation; and a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue such erection.

Therefore, where the trustees of a turnpike road build buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into Court in full satisfaction of the trespass:

Held, that, after notice to defendants to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar. *Holmes v. Wilson*, 505.

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Held, that the conveyance was not a condition precedent to, or concurrent with, the payment, and that A. might therefore sue for the purchase-money and interest without previously tendering a conveyance. *Mattock v. Kinglake*, 50

3. What not a contract for an interest in land.

Plaintiff and defendant orally agreed (in August) that defendant should give 45*l.* for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with defendant's; that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; defendant was to harvest the corn, and dig up the potatoes; and plaintiff was to pay the tithes.

Held, that it did not appear to be the intention of the parties to contract for any interest in land, and the case was, therefore, not within the Statute of Frauds, 29 C. 2, c. 3, s. 4, but a sale of goods and chattels, as to all but the lay grass, and, as to that, a contract for the agistment of defendant's cattle. *Jones v. Flint*, 753

III. Sale of goods.

1. Cross contract subject to periodical accounts.

Plaintiff and defendant agreed that defendant should recommend customers to plaintiff, who was a tailor, and that plaintiff should allow defendant 10 per cent. upon the business so procured, to be received in clothes by defendant from time to time, as he might want them; and that a settlement of accounts should take place between the parties every six, or, at farthest, every twelve months.

Plaintiff having sued in debt for goods sold and delivered, and having merely proved the delivery and acceptance of clothes,

Held, that he could not recover, but that, on *nunquam indebitatus*, he was bound to prove a settlement of accounts, on which the balance was in his favour.

Seem, that had there been no stipulation as to the settlement of accounts, it would have been sufficient for plaintiff to prove the delivery and acceptance, and would have lain on defendant to prove a per-centage due to him to the amount of what was so delivered. *Garey v. Pyke*, 512

2. Condition or distinct contract for resale.

Plaintiff entered into a parol agreement to sell to defendant a mare for 20*l.*, subject to the condition that, if it should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it on request. Plaintiff delivered the mare and received 20*l.* On its proving to be in foal, he tendered to defendant 12*l.*, and requested him to return the mare, which defendant refused to do.

Held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to defendant; and that the delivery of the mare to defendant took the whole agreement out of the Statute of Frauds, 29 C. 2, c. 3, s. 17, so as to enable plaintiff to sue defendant for the refusal to return it. *Williams v. Burgess*, 499

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Testator devised lands to L. for life, remainder to his first and other sons and daughters successively in tail. L. died, leaving one son, and one posthumous daughter. The son died. Testatrix, being ignorant of the existence of the daughter, made a codicil, reciting the death of L. without leaving any issue, and devising the land to H., in the same manner as she had before done to L.: Held, that the codicil must be construed as a conditional revocation only, and was inoperative as against the daughter of L., though testatrix, after making the codicil, and two years before she died, had become acquainted with her existence. *Doe dem. Evans v. Evans*, 222

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The objection of incompetency on the ground of interest, arising on the examination of a witness, may be removed by the parol evidence of the same witness that he has been released; though his interest appears on the face of the plea which he is called to prove.

Therefore where, in an action against the acceptor of a bill, defendant pleaded that it was accepted for the accommodation of the drawer, who endorsed it to plaintiff without consideration: Held, that the drawer, who was called by defendant to prove the plea, and who gave parol evidence of a release by defendant, was competent, without producing or formally proving the release.

Quære, whether, in such case, a release be necessary since 3 & 4 W. 4, c. 42, s. 26? *Lewis v. Row*, 606

3. See also *EVIDENCE*, II.

II. Remuneration.

A party wishing to produce the roll of attorneys in the Court of Chancery as evidence

on a trial in K. B., applied to the senior clerk of the Petty Bag Office to procure an order from the Master of the Rolls for their production, which was granted, according to the usual practice, and the senior clerk was then subpoenaed to produce the roll, he being the proper officer.

Held, that the clerk might claim, for attendance at the trial with such roll, not the common remuneration of a witness appearing on a subpoena duces tecum, but reasonable fees to a larger amount, which were proved to have been usually paid, for fifty years past, to clerks attending with records from the Petty Bag Office.

Although he did not, when subpoenaed, inform the party that he should demand remuneration as a clerk attending under the order of the Master of the Rolls, and not as an ordinary witness.

And although he did not produce the roll himself, but sent it by his clerk. *Bentall v. Sydney*, 162

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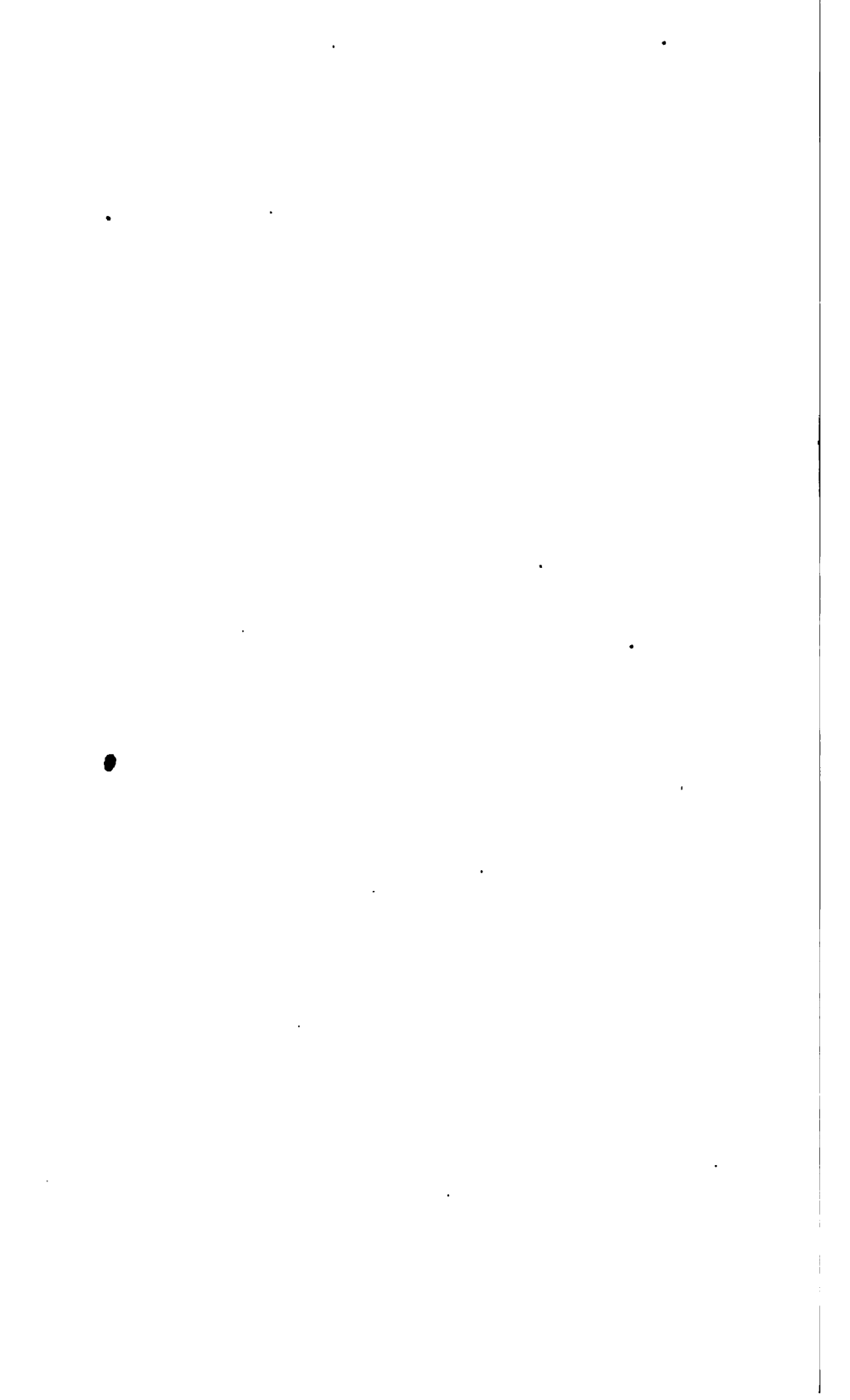
The term "wreck" in stat. 3 & 4 W. 4, c. 52, s. 50, is not necessarily limited to goods which become forfeit to the Crown, or its grantees, by not being claimed within a year and a day according to the stat. Westminster 1 (3 Ed. 1, c. 4).

Goods were imported into this country, warehoused, entered for exportation, and shipped for Belgium: the vessel was lost within the English port, and the goods, being partly thrown upon the shore, and partly found floating on the sea and landed, were conveyed to the warehouse of the lord of the manor, and immediately claimed by the owner. Held, that they were chargeable with duty as "wreck brought or coming into the United Kingdom," within stat. 3 & 4 W. 4, c. 52, s. 50. *Barry v. Arnaud*, 646

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NEW CASES

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

PEREGRINE BINGHAM,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW.

VOL. VI.

FROM TRINITY VACATION, 2 VICTORIA, 1839, TO MICHAELMAS TERM,
4 VICTORIA, 1840, BOTH INCLUSIVE.

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1865.



JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICHOLAS CONYNTHAM TINDAL, Knt., Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

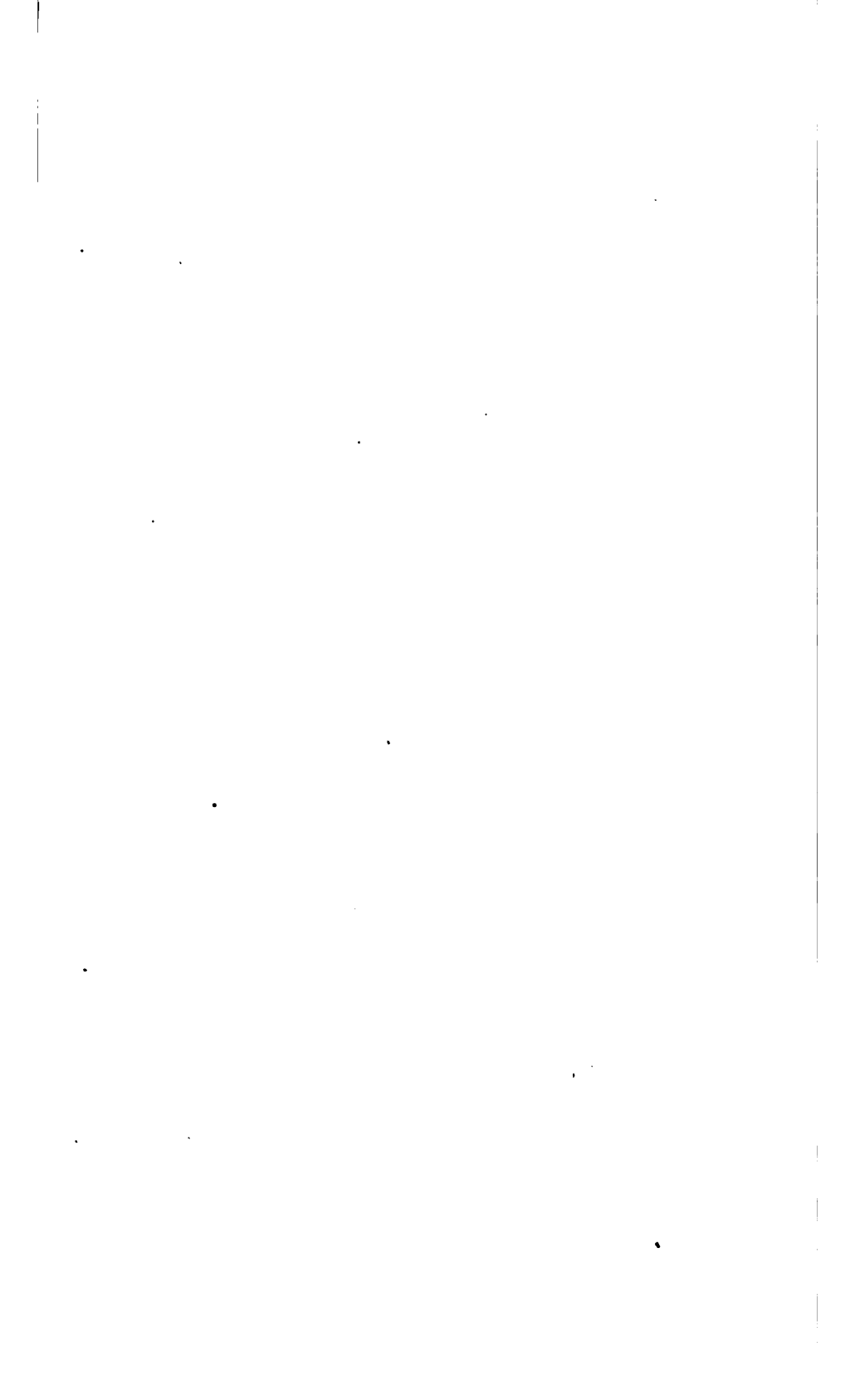
The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.

Hon. Sir THOMAS COLTMAN, Knt.

The Right Hon. THOMAS ERSKINE.

Hon. Sir WILLIAM HENRY MAULE, Knt.



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IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS.

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(CONTINUED.)

IN THE

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IN THE EXCHEQUER CHAMBER.

CHADWICK against TROWER and Others. (a)—p. 1.

The mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall. Nor, if he be ignorant of the existence of the adjoining wall,—as where it is under ground,—is he bound to use extraordinary caution in pulling down his own.

CASE The declaration contained two counts; in the first, the plaintiffs below alleged that they were possessed of a certain vault or cellar with certain wine therein, adjoining to certain other vaults and walls, and which in part rested upon, and was of right supported in part, by parts of the adjoining vaults and walls; that the plaintiffs were right entitled that their vault or cellar should be so supported in part; and that there were certain foundations belonging to, and supporting the said vault or cellar, which the plaintiffs ought to enjoy: yet that the defendant below wrongfully took down and removed the said vaults and walls, so adjoining to the said vault or cellar of the plaintiffs, without shoring or propping up, or taking other reasonable or proper precaution to support or secure it, so as to prevent its being weakened or destroyed; and wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the said foundations from being weakened and giving way. The count then stated the injury which the plaintiffs had sustained, and the special damage which followed thereon. The second count stated, that the defendant was

(a) The reporter, having been unavoidably absent from London when this case was decided, is indebted to the kindness of a gentleman at the bar for his note of the judgment.

about to pull down the adjoining vaults and walls, and alleged it to have been the duty of the defendant, in the event of his not shoring up the walls, *to give notice to the plaintiffs of his intention to pull down*; and also that it was his duty to use due care and skill, and to take due, reasonable, and proper precaution about the pulling down his vaults and walls, so that for want of such precaution the plaintiff's vault should not be injured; and then alleged as a breach of such duty, that the defendant pulled down his vaults and walls without giving the plaintiffs notice of his intention, and without taking due care and precaution in the pulling down, whereby the plaintiff's vault was injured, and the wine in it destroyed.

The defendant pleaded, first, not guilty. Secondly, that the vault or cellar of the plaintiffs, in the first count mentioned, did not rest upon, nor was of right in part supported by, parts of the said adjoining vaults and of the said walls in that count mentioned, in manner and form as the plaintiffs had in the count alleged: conclusion to the country.

Thirdly, that the plaintiffs were not before, and at and during the times in the said first count in that behalf mentioned, or at any of those times, of right entitled that their said vault or cellar should be supported by the said parts of the said adjoining vaults and walls in that count mentioned, in manner and form as the plaintiffs had in that count alleged: conclusion to the country.

Ninthly,—as to so much of the second count as related to the defendant not giving due and reasonable notice to the plaintiffs of his intention to pull down, prostrate, and remove, the said vaults and walls, adjoining the said vault of the plaintiffs, in that count mentioned,—that the plaintiffs had notice of the defendant's intention to pull down his vaults and walls, and witnessed the preparations and commencement of the work in time to have enabled themselves to have protected themselves. Verification.

Tenthly,—as to so much of the second count as charged the defendant with not having used due care and skill, or taken due, reasonable, and proper precaution in and about the pulling down, prostrating, and removing the vaults and walls adjoining the vault of the plaintiffs in that count mentioned,—that the defendant did take care, &c. Conclusion to the country.

The plaintiffs joined issue on the first, second, third, and tenth pleas; and to the ninth plea, replied, that the plaintiffs had not notice of the defendant's intention, and did not witness the said preparations and commencement of the work of pulling down, prostrating, and removing the said vaults and walls, in due and sufficient time, before any damage was done to their said vault and its contents in the second count mentioned, to have enabled themselves to have protected themselves in that behalf, as in the ninth plea alleged: conclusion to the country; whereupon issue was joined.

To the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and thirteenth pleas the plaintiffs demurred.

The demurrers were argued in the Court of Common Pleas in Trinity term, 1836; and in the Michaelmas term following the Court gave judgment for the plaintiffs below upon all of them. (a)

The cause, as to the issues of fact, was tried before TINDAL, C. J., *et*

(a) See the declaration and pleas at length, 3 New Cases, 334; (7 E. C. L. R. 142,) 3 Scott 899.

the sittings at Guildhall after Hilary term, 1837, when a verdict was found for the plaintiffs below, on all the issues, with general damages.

The defendant below afterwards brought a writ of error, and assigned for error that the verdict of the jury applied to the second as well as the first count of the declaration, and that the second count was bad in law.

Wightman, for the defendant below.

The damages are assessed generally. It cannot be ascertained whether they were given on the first count, or on the second, or on both; and, therefore, if either of the counts be ill, there must be a *venire de novo*. But the second count cannot be supported in law; for it avers that it was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' vault, to give notice to the plaintiffs of his intention to pull down the vaults and walls adjoining; the count, however contains no allegation of any right of easement in *alieno solo*, and no obligation to give such notice results as an inference of law from the mere circumstance of the juxtaposition of the walls of the plaintiffs and the defendant. At the trial upon proper questions put to the jury, the damages might have been confined to that part of the count which alleges the injury to have been occasioned by the defendant's neglecting his duty to use due care and skill in pulling down his own wall; *Peyton v. Mayor of London*, 9 B. & C. 725, (17 E. C. L. R. 483;) but no such appropriation having been made, for aught that appears, the jury may have assessed the damages for want of a notice which the defendant was not bound to give, at all events, upon such a state of facts as is set forth in the second count; for it is not alleged even that the defendant knew of the existence of the plaintiffs' wall, and without such knowledge he could not be required to give notice of his own intentions.

W. H. Watson, for the plaintiffs below. The second count may be sustained, even if the duty of giving notice ascribed to the defendant do not exist. But that duty is necessarily implied by law, although no case has yet decided the express point; for actions have been maintained for injuries occasioned by the act of a neighbour, without alleging the act to have been done either negligently or wrongfully. Thus, in *Slingsby v. Barnard*, 1 Roll. Rep. 430, it is laid down, that if a man dig a pit in his own land so near to my house, that the house falls, an action on the case lies; and in *Jones v. Bird*, 5 B. & Ald. 837, (7 E. C. L. R., 277,) it was held that commissioners of sewers and persons working by their order in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up, if necessary, as skilful persons would do; also to give specific notice to the owners of adjoining houses of the danger arising from the construction of the sewer. In *Peyton v. the Mayor of London*, the Court abstained from giving any opinion on the point now in contest: but in *Brown v. Windsor*, 1 Cr. & Jer. 20, where the plaintiff's house was built in 1803, against the pine-end wall of the defendant's house, by permission, and the defendant, in 1829, made an excavation in a careless and unskilful manner in his own land, near to his pine-end wall, by which he weakened his pine-end wall and injured the plaintiff's house, it was held, that an action on the case was maintainable for the injury; and GARROW, B., said, "There may be cases where a man altering his own premises cannot support his neighbour's, and the support, if necessary,

must be supplied elsewhere: in such case he must give notice, and then, if any injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take the precaution." Then, in *Dodd v. Holme*, 1 Ad. & Ell. 493, (28 E. C. L. R. 128,) the plaintiff and defendant having adjacent lands, the former built a house at the extremity of his land; the latter afterwards excavated his own soil near to, but without touching the ground so built upon: The declaration alleged that the defendant, so negligently, unskilfully, and improperly, dug his own soil, that the plaintiff's house was thereby injured: BOLLAND, B., in his summing up, said, "If I have a building on my own land, which I leave in the same state, and my neighbour digs in his land adjacent, so as to pull down my wall, he is liable to an action:" and the jury having found that the injury to the house was the consequence of the defendant's negligence, the Court refused to disturb the verdict for the plaintiff. If, then, it be a duty imposed on a party not to do work so incautiously as to injure his neighbour's rights, it is clearly a want of proper caution to omit giving such notice as may enable the neighbour to take steps for his own security. [PARKE, B. The duty of giving notice in such cases seems to be one of those duties of imperfect obligation which are not enforced by the law.]

Then, the allegation of want of notice may be rejected as surplusage, and the damages be ascribed to that part of the count which is unobjectionable. The *gravamen* of the charge is the defendant's omission to use due care, skill, and precaution in pulling down his own walls. No injury is alleged to have resulted to the plaintiffs from the want of notice in particular; and, after verdict, the Court will not assume it. In 2 Wms. Saund. 171 c, it is laid down, that "if an action be brought for speaking words *all at one time*, that is, all in one count, and there is a verdict for the plaintiff, though some of the words will not maintain the action; yet if any of the words will, the damages may be given entirely; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation." In *Dyeball v. Doe dem. Laurie*, 2 Mann. & Ry. 184; S. C. 8 B. & C. 70, (15 E. C. L. R. 154,) on a writ of error brought to reverse a judgment in ejectment, (a) which had been entered up generally for the plaintiff below, the ejectment having been brought for a messuage *and tenement*, Lord TENTERDEN said, "If ejectment lies for a tenement of any kind, this may be deemed to have been such a tenement. If not, the damages may all be applied to the messuage. It is an established rule, that, where one count contains two claims or complaints, for one of which the action is maintainable and not for the other, all the damages may be applied to the good cause of action. Where they are stated in separate counts, it is different." [PATTERSON, J. There is a precise issue here upon the fact of notice; and the jury have found that there was none.] But *Wyatt v. Harrison*, 3 B. & Adol. 871, (23 E. C. L. R. 205,) and the authorities before cited, show that negligence and want of caution are of themselves a sufficient ground of action.

Wightman, in reply. Still the damages may have been given for want of notice, and unless it can be shown that they were not so given, the verdict cannot stand.

PARKE, B. We are unanimously of opinion that the judgment of

(a) See *Doe d. Laurie v. Dyeball*, 1 M. & P. 330, (17 E. C. L. R. 184.)

the Court below must be reversed. The question arises upon the second count of the declaration, which states that the plaintiffs were possessed of a certain vault and of a certain wine therein, and that the defendant was about to pull down and did pull down and prostrate certain other vaults and walls next adjoining the vault of the plaintiffs: the count then goes on to state that thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiff's walls, to give due and reasonable notice to the plaintiffs of his, the defendant's intention to pull down his vaults and walls, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves: it then goes on to allege another duty in the defendant, viz. to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, &c., so adjoining the plaintiffs' vault, so that, for want of such care, skill, and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed, or the plaintiffs be injured in respect thereof; and it then proceeds to allege as a breach that the defendant wrongfully and injuriously pulled down, prostrated, and destroyed the vaults, &c., so adjoining the plaintiffs' vault, without giving them due or reasonable or other notice of his, the defendant's intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiffs' vault, and the defendant did not nor would use due care or skill, or take due, reasonable, or proper precautions in or about the pulling down or prostrating or removing the vaults, &c., so adjoining the plaintiffs' vault, upon that occasion, according to his said duty. And a general verdict has been found for the plaintiffs, with general damages.

The plaintiffs do not in this count allege any right to have their vault supported by the vaults or walls of the defendant; therefore, no *right* of theirs has been injured by the act of the defendant. The duty to give notice is charged as one arising from the contiguity of the defendant's vault to that of the plaintiffs. No doubt can be entertained as to the opinion of the Court of Common Pleas upon this question. The lord chief justice, in delivering the judgment of the Court, says, "There is no allegation in this count of any right of easement in *alieno solo*, which forms the ground of the plaintiffs' action in the first count. And, as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore up himself, it is objected, *and we think with considerable weight*, that no such obligation results, as an inference of law, from the mere circumstance of the juxtaposition of the walls of the defendant and the plaintiffs." We also think it is impossible to say that under such circumstances the law imposes upon a party any duty to give his neighbour notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantive ground for damage: and the probability is, that the main damage did result from the want of notice; for it is obvious, that, if notice had been given, the plaintiffs might have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think the judgment must be arrested, and a *venire de novo* awarded.

But, supposing that the improperly pulling down the defendant's vaults and walls may be treated as the substantive cause of action, au

that the second branch of the argument that has been urged on the part of the plaintiffs is well founded, (which we think it is not,) then the question arises, whether any such duty as that which is alleged to have been violated is by law cast upon the defendant. The duty alleged to be cast upon the defendant by reason of the proximity of his premises to those of the plaintiffs, is, "to use due care and skill, and to take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, buildings, and walls adjoining the plaintiffs' vault, so that for want of such care, skill, and precaution, the vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs injured in respect thereof:" and the breach alleged is, "that the defendant did not nor would use due care or skill, or take due, reasonable, or proper precaution in or about the pulling down, prostrating, or removing the said vaults, buildings, or walls so adjoining the said vault of the plaintiffs, according to his duty." The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls, as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognisant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence: for, one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think no such obligation as that alleged exists in the absence of notice. And, therefore, upon this ground also, we think the count is bad; and, consequently, there must be a *venire de novo*.

Venire de novo.

MEMORANDUM.

On the 25th of September, 1839, Mr. Justice VAUGHAN died at his seat near Watford, aged seventy-one years.

NEW CASES
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS.

Michaelmas Term,

IN THE

Third year of the reign of Victoria.—1839.

The Judges who usually sat in Banc during this term were,

TINDAL, C. J.,
BOSANQUET, J.,

COLTMAN, J.
MAULE, J.

BISHOP, Executrix of BUGBY, against MARSH.—p. 12.

- 1 The affidavit in support of a motion to enter a suggestion for costs under the Middlesex Court of Requests' act need not state that the cause of action arose within the jurisdiction of the Court.
2. The motion may be made, as well in a cause tried before the under-sheriff as in one tried before a judge.
3. The motion lies as well against an executor plaintiff as any other.

UPON an affidavit that this action was brought to recover 3*l.* 7*s.* for work alleged to have been done by Bugby in his lifetime for the defendant; that the cause was tried before the under-sheriff of Middlesex, when the plaintiff obtained a verdict for 1*l.* 19*s.* 2*d.* only; and that the defendant, before and at the time of the commencement of the suit, was inhabiting and resident at, &c., within the county of Middlesex, and within the jurisdiction of the county court of Middlesex, and was during all that time liable to be warned and summoned to the court of requests for the county of Middlesex,

James obtained a rule *nisi* for entering a suggestion on the record that the defendant was entitled to double costs.

Petersdorff, who showed cause, objected, first, That the affidavit was insufficient, having omitted to allege that the cause of action arose within the jurisdiction of the court of requests. By section 4 of 23 G. 2, c. 33, which established the Middlesex court of requests, it is provided "that no person or persons shall be liable to be summoned to the said county court at the suit of any plaintiff or plaintiffs other than such person or persons as was or were liable to be summoned to the county court of Middlesex before this act was made; and that this act shall not extend to give the said county court any jurisdiction to hold plea of, or to hear or determine any action, cause, or suit, other than such action, cause, or suit as the county court of Middlesex might have held plea of by plaint before the making this act:" That proviso must be taken in connexion with the enacting clause in sect. 19, "that in case any action of debt, or action upon assumpsit, shall be commenced and prosecuted in any of his majesty's courts of record at Westminster, and the defendant or defendants, at the time of such action brought, shall live or reside in the said county of Middlesex, and be liable to be summoned to the said county court, and the jury upon the trial of such cause shall find the damages for the plaintiff under the value of 40*s.*, unless the Judge shall in open court certify on the back of the record, that the freehold or title of the plaintiff's land principally came in question, or that an act of bankruptcy principally came in question at such trial, then and in such case, no costs shall be awarded to the plaintiff in such action, but the defendant or defendants shall be entitled to and recover double costs of suit:" If so, the defendant in making this application ought to establish by affidavit that he was entitled to the interposition of the court by averring, as he must have done in a declaration or plea, that the cause of action arose within the jurisdiction. In *Bailey v. Chitty*, 2 Mees. & W. 31, PARKE, B., said, "It is clear the action cannot be brought in the county court, unless both the defendant resides, and the cause of action arises, within the county." Though the defendant resided in Middlesex, the cause of action might have accrued at York.

James. The affidavit is in the ordinary form, and pursues the language of the statute: if the defendant relies upon the proviso, which is a distinct enactment, it is for him to show that his case falls within it: an affidavit that the cause of action arose at York would be an answer to the application.

TINDAL, C. J. It appears to me that this preliminary objection cannot be allowed. The suggestion and affidavit are in the precise words of sect. 19. There is indeed a distinct proviso, which says, that unless the cause of action arises within the jurisdiction of the court, the defendant shall not be liable to be summoned; but where he is an inhabitant, and the sum recovered is within the statutory amount, it is for the defendant to show that his case falls within the proviso.

Petersdorff then objected, that double costs ought only to be granted in cases where the judge who tries the cause is empowered to certify to deprive the plaintiff of costs under 43 Eliz. c. 6, s. 2; that this cause had been tried before the under-sheriff by writ of trial; and that he had no power to certify: *Wardroper v. Richardson*, 1 Adol. & Ell. 75, (28 E. C. L. R.) It had been decided that the act did not apply to the

case of a judgment by default and writ of inquiry: *Harris v. Lloyd*, 4 M. & Selw. 171.

TINDAL, C. J. Here there has been a trial, and it must have been on the plaintiff's application that it took place before the under-sheriff. The defendant, perhaps, might have urged the objection when the plaintiff applied for a trial before the under-sheriff, but it does not affect the application for a suggestion under this act of parliament.

Petersdorff. At all events, as the plaintiff sues in the capacity of executrix, she ought not to be subjected to double costs. The statute 3 & 4 W. 4, c. 42, which renders executors and administrators liable to costs, applies only to cases of nonsuit or verdict for the defendant.

James, in answer to this objection, relied on *Wase v. Wyburd*, Dougl. 246, where an action of *assumpsit* was brought against an inhabitant of Middlesex by an administrator, and the damages found being under 40s., the defendant was held to be entitled to have a suggestion on the roll, in the same manner as if the plaintiff had sued in his own right.

TINDAL, C. J. The language of 3 & 4 W. 4, c. 42, s. 31, is general, "that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a judge of any of the said superior Courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

It is for the executor to apply to the Court if he can show any special ground for exemption.

BOSANQUET, J. In *Wase v. Wyburd* it was argued, that that case was not within the meaning of the act, as persons suing in the character of administrator or executor were not liable to the payment of costs, even where there was a verdict against them. But Lord MANSFIELD asked "if there was any exception as to administrators in the statute, and it appeared that there is no such exception."

COLTMAN, J., and ERSKINE, J., concurring, the rule was made Absolute.

ADCOCK v. FISKE.—p. 17.

Defendant, having been outlawed in a cause after judgment, and having been discharged from the debt by the Insolvent Debtors' Court while in custody under the outlawry, this Court refused to charge him in custody on the judgment in outlawry.

On the 10th of June, 1839, the defendant, having been outlawed in this cause after judgment, surrendered himself in discharge of his bail.

On the 2d of August following, the defendant being in custody under the outlawry, the plaintiff lodged with the warden of the Fleet prison a *habeas corpus cum causa* against him.

On the same day the defendant was discharged by the Insolvent Debtors' Court from his debt to the plaintiff.

On the 12th of October, the defendant being still in custody under the outlawry, the plaintiff lodged with the warden of the Fleet another *habeas corpus cum causa*; and

Kelly afterwards obtained a rule *nisi* to charge the defendant in custody, at the suit of the plaintiff, upon the judgment in outlawry entered up against the defendant.

Wilde, Serjt., was about to show cause, when

Kelly objected that the defendant, being an outlaw, could not be heard till he had reversed the outlawry. But

TINDAL, C. J., referred to *The Queen v. The Commissioners of the Insolvent Debtors' Court*, 3 Nev. & Perr. 543, as a conclusive authority to the contrary.

Wilde. The defendant having been discharged from the debt by order of the Insolvent Debtors' Court, cannot now be charged in custody on the judgment in outlawry. In *Dickson v. Baker*, 1 Adol. & Ell. 853, the Court of King's Bench refused to reverse the outlawry on the ground that the prisoner had been discharged from the debt; but in *The Queen v. The Commissioners of the Insolvent Debtors' Court*, it was held, that a prisoner in custody on a *capias utlagatum* for non-payment of damages and costs, might be discharged under the Insolvent Debtors' Act, 7 G. 4, c. 57, without previous reversal of his outlawry.

Kelly. In that case the plaintiff asked for a writ of prohibition to restrain the Insolvent Debtors' Court from proceeding on a matter strictly within their jurisdiction; namely, the debt due from the defendant; but that Court has no authority to release the defendant from the effect of an outlawry, and the plaintiff here seeks to charge the defendant on a judgment of outlawry still in force. In *Dickson v. Baker*, LITLEDAL, J., says, "It seems hard that a man should be taken up, after he has been discharged by the Insolvent Debtors' Court; but we have no power to reverse the outlawry."

TINDAL, C. J. This is an application to charge the defendant in custody under a judgment of outlawry. The defendant has been discharged by the Insolvent Debtors' Court from the debt sought to be recovered by the action in which the judgment of outlawry has been obtained; but the plaintiff contends that the defendant as an outlaw is not entitled to be heard in this Court, and that the Insolvent Debtors' Court could not relieve him from the effect of the outlawry. The first objection is answered by *The Queen v. The Commissioners of the Insolvent Debtors' Court*; and I think the words of the Insolvent Debtors' Act are sufficiently large to prevent the defendant from being charged under the outlawry in respect of the debt from which the Insolvent Debtors' Court has discharged him.

BOSANQUET, J. The question is, not whether the defendant is entitled to be discharged from the outlawry, but whether, being in custody under the outlawry, he is liable to be charged in execution for the debt sought to be recovered in this suit. But, as he has been discharged from that debt by the Insolvent Debtors' Court, the foundation of the claim is gone, and he cannot be now charged in execution.

COLTMAN, J. The debt being discharged by the judgment of the Insolvent Debtors' Court, there is no ground for charging the defendant in execution.

ERSKINE, J. The effect of the discharge by the Insolvent Debtors' Court is to release the defendant from imprisonment in respect of the judgment for the debt recovered in this action; and the plaintiff cannot now charge him on the judgment in outlawry.

Rule discharged.

EDMAN against ALLEN.—p. 19.

In an action on an agreement to let plaintiff a messuage for a year from the 25th of March, plaintiff to take the fixtures at a valuation and to pay for the same on entry, Held, that it was open to plaintiff to show a tender on the 10th of April.

Assumpsit, on an agreement by the defendant to let to the plaintiff a messuage in Northamptonshire, for one year, from the 25th of March, 1838; the plaintiff to take the fixtures at a valuation in the usual way, and to pay for the same on entry. Averment of the plaintiff's readiness to fulfil the agreement, and to take the fixtures at a valuation in the usual way, and pay for the same. Breach, that the defendant would not let the plaintiff into possession.

Pleas: first, *non assumpsit*. Secondly, that the usual way of ascertaining the value of fixtures in Northamptonshire, in the case of an incoming tenant, is, for the lessor to appoint a person to value on *his* behalf, and the incoming tenant to appoint another person to value on *his* behalf; the two appraisers to meet on the premises, and jointly ascertain the value of the fixtures; and if they cannot agree, to nominate a third person: the valuation to be completed before the time when, by the terms of the demise, the tenant is to have possession of the premises: that the defendant gave notice to the plaintiff that the defendant had appointed A. B., to be his valuer, and that A. B. would attend on the premises to meet the plaintiff's valuer on the 19th of March, 1838: that A. B. attended; but that the plaintiff did not on the 19th of March, or on any day before or upon the 25th of March, cause any valuer to attend on his behalf, or any valuation to be made; in consequence of which no valuation could be made or was made, and the defendant refused to allow the plaintiff to take possession.

The plaintiff replied *de injuriâ*.

At the trial before BOSANQUET, J., it was proved that the defendant's valuer attended on the premises on the 19th of March. The plaintiff adduced evidence to show that his valuer was kept away, and the valuation prevented, by the fraud of the defendant: also, after objection made on behalf of the defendant, and overruled, that the plaintiff, on the 10th of April following, had tendered 10*l.* as the value of the fixtures, and had demanded possession.

The jury having found for the plaintiff,

Adams, Serjt., obtained a rule nisi for a new trial, on the ground that the evidence objected to ought not to have been admitted. The tender was too late, and the replication contained no allegation of fraud.

Goulburn, Serjt., and Hildyard showed cause. The only evidence objected to at the trial was the tender and demand of possession on the 10th of April. That evidence was properly received, because, though the plaintiff's term was to commence on the 25th of March, there was nothing in the agreement to compel him to enter on that day; and it was sufficient if he tendered or paid for the fixtures on entry. The allegations in the plea were negatived by the finding of the jury, and the plea itself is ill; *Carpenter v. Blundford*, 8 B. & C. 575, (15 E. C. L. R. 301.)

Adams and N. R. Clarke, in support of the rule, contended that the valuation of the fixtures on or before the day of entry appointed by the demise, was a condition precedent to the plaintiff's right to enter; and

thing that passed, therefore, after the 25th of March, was irrelevant to the question in dispute, and ought not to have been received in evidence, as the only effect of such evidence would be to prejudice the jury.

TINDAL, C. J. The only question is, whether evidence was admitted which by law was inadmissible. I agree that if, by the terms of the instrument, the plaintiff was to enter on the 25th of March, and was to pay an ascertained amount on that day, he would, unless he paid on that day, have no ground of action for not being let into possession. But the clause in the agreement is, that he must take the fixtures at a valuation, and pay on entry; that is, when he enters he must pay. The evidence was, that the plaintiff met a person on the premises, tendered 10*l.*, and demanded possession. It is said that this took place after the 25th of March, when the tenancy was to commence. It cannot, however, be said, that the evidence, which, as far as it goes, throws a light on the previous transactions between the parties, was inadmissible; and we are not now to consider whether the plea was properly found or not. The plaintiff had a continuing right of entry, and there was a continued refusal to admit him on the part of the defendant: the evidence, therefore, was properly received, and the rule must be discharged.

BOSANQUET, J. The allegations of the plea have been negatived by the finding of the jury, and the only question is as to the propriety of admitting the evidence of tender and demand of possession on the 10th of April. I think that evidence was admissible to show the defendant's refusal to permit an entry and the damages sustained by the plaintiff.

COLTMAN, J. I think the question is not unattended with difficulty. The plea is, that by the custom of the country the valuation should be completed before the time when, by the terms of the demise, the tenant was to have possession of the premises; that the plaintiff did not cause any valuation to be made before that time; and that, therefore, the defendant refused to allow him to take possession. The replication puts the whole of that plea in issue. But the evidence in question is addressed to one of the allegations in the declaration which is not put in issue; and it seems to me that it was not relevant to the issue raised on the plea, and therefore not admissible.

ERSKINE, J. I am of opinion that this rule must be discharged. The only question is, whether or not the evidence was admissible. This is an action by a lessee against a lessor for refusing to allow him to enter: the lessor says, I refused, but it was because you omitted to value the fixtures and tender the amount according to the custom of the country, before the 25th of March, the day on which the term commenced. Every allegation in the plea is traversed, and a witness is called to prove that 10*l.* was tendered as the value of the fixtures. I do not see how that evidence could have been refused in any stage of the cause: but there is nothing in the agreement which ties the plaintiff down to an entry on the 25th of March, and the jury have negatived by their verdict that the payment was to be made on or before that day.

Rule discharged.

HILL against WHITE, WILLIAMS, and BOULTER.—n. 23.

Plaintiff declared against A., B., and C., for 35*l.*, due in respect of work done for them. Defendants pleaded that the work was done for them jointly with D. It appeared that one portion of the work was done for A.; another portion, to the amount of 4*l.*, for A., B., C., and D.; a third portion for A., B., and D.; and a fourth for A. and B.: Held, that the plea was an answer to the action.

UPON a reference of this cause, by order of nisi prius, the arbitrator awarded that the verdict, which was then entered for the plaintiff, should be set aside, and a verdict be entered for the defendants in lieu thereof: but stated the following facts for the opinion of the Court:—

The declaration was in *assumpsit*, the first count being for work and labour as an attorney; the second, for money paid to the defendants' use; the third, on an account stated. The defendants pleaded in abatement to the whole declaration, that the promises were made jointly with one M. A. Griffiths; which was traversed in the replication. By his particulars of demand, the plaintiff claimed 35*l.* 14*s.* 8*d.*, for business done by the plaintiff as the attorney and solicitor of the defendants. He gave in evidence an account amounting to that sum, which was divisible into four parts; the first was chargeable to the defendant, Boulter, alone; the second, which amounted to the sum of 4*l.*, was chargeable to all the defendants and M. A. Griffiths jointly, as in the plea alleged; the third was chargeable to the defendants, White, and Boulter, and M. A. Griffiths jointly, but not the defendant, Williams; the fourth was chargeable to White and Williams jointly, and not to the defendant, Boulter. The work was proved to have been done: and the plaintiff insisted that, as the plea did not apply to the whole sum claimed in the particulars, and there was no defence on the record to meet the sum not covered by that plea, he was entitled to nominal damages.

If the Court should be of that opinion, the verdict which was then entered for the plaintiff, was to stand, but the damages were to be reduced to 1*s.*

Butt, for the plaintiff. The plea is ill, for it is pleaded to the whole of the plaintiff's demand, and yet applies to 4*l.* only, out of 35*l.* It has not been sustained in proof, and therefore being bad as to part is bad for the whole; Stephen on Pleading, 484. The defendant should have pleaded in abatement as to part, and in bar as to the residue; 2 Wms. Saund. 210. In *Godson v. Good*, 6 Taunt. 587, (1 E. C. L. R. 492,) it was held that a plea in abatement, that the defendant, jointly with sixteen others, contracted, imported that the defendant, jointly with sixteen others and no more, contracted; and that if there were more joint contractors than the seventeen, the plea was disproved.

So in *Herries v. Jameson*, 5 T. R. 553, on a writ in debt for 1066*l.*, plaintiff declared for 1000*l.*, borrowed by defendant of plaintiff, and, in a second count, for 66*l.*, for interest of money lent by plaintiff to defendant. Defendant pleaded, in abatement of the writ, that "the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from plaintiff," was borrowed by defendant and others, and not by defendant separately. On demurrer, because that plea answered only one of the causes of action—the cause mentioned in the first count—the Court held the plea bad.

In *Powell v. Fullerton*, 2 B. & P. 420, it was held, that if a plea in

abatement contain matter which goes in part abatement of the writ only, but concludes with a prayer that the whole writ may be abated, the Court may abate so much of the writ as the matter pleaded applies to.

TINDAL, C. J. I think this case is free from all doubt. It is an action for work and labour by an attorney against three defendants, and in that action he can recover no debt that is not due from those three. The defendants meet the demand by a plea in abatement that the contract on which the plaintiff sues was entered into, not by the three defendants alone, but by the three jointly with another; and the arbitrator finds that there is no debt due from the three, but that there is a debt due from them jointly with M. A. Griffiths. In *Herries v. Jameson*, the plea was pleaded to one count only of the declaration, and in *Godson v. Good* was altogether false. Here it is true, as the defendants have stated, not that every possible cause of action the plaintiff might have was against themselves and M. A. Griffiths, but the cause on which the plaintiff proceeds.

BOSANQUET, J. I am of the same opinion. If the plea is not true, the plaintiff is entitled to a verdict; but if he had no cause of action against the three defendants alone, they are entitled. The precise amount sought to be recovered is not material; and the plaintiff has failed to show that he has any contract with the three defendants, other than that which they have entered into jointly with a fourth.

COLTMAN, J. The case is free from doubt. The plaintiff cannot recover except on his bill of particulars, which is for work done for the three defendants. He cannot give in evidence work done for those three jointly with a fourth. There must be

Judgment for the defendants.

MAULE, J., was absent.

HILL against WHITE and WILLIAMS.—p. 26.

To a count for work done, defendants pleaded that the work was done for them jointly with others. Plaintiff proved that work to the amount of 5*l.* was done for defendants, and to the amount of 36*l.* 5*s.* for defendants jointly with others: Held, that the plea was no answer to the action.

UPON a reference of this cause by order of Nisi Prius, the arbitrator ordered that the verdict, which had been entered for the plaintiff, should stand, but that the damages should be reduced to the sum of 5*l.*, subject to the opinion of the Court upon the following facts:—

The declaration was in *assumpsit*, and contained three counts: 1*st* For work and labour as an attorney. 2*d*, For money paid to the use of the defendants at their request. 3*d*, On an account stated. The defendants pleaded in abatement, that the promises in the declaration were made jointly with Benjamin Boulter, John Boulter, William Standy, Josiah Griffiths, Hannah Griffiths, now the wife of William Robinson, Susannah Griffiths, Samuel Henry Turner, Mary Ann Griffiths, and John Griffiths; which plea was traversed in the replication.

The plaintiff, in his particulars of demand, claimed 98*l.* 2*s.* 8*d.*, the balance of an account for business done by the plaintiff as the attorney of the defendants. He proved that he had done business for the two defendants jointly. There was no account which showed any balance of 98*l.* 2*s.* 8*d.*; but the plaintiff produced two bills, which were divisible into three parts; one, to the amount of 5*l.*, was for business done for the

defendants in and about the trusts of the will of one Mary Griffiths, of whom the defendants were executors: the second, to the amount of 36*l.* 5*s.*, was for business done in the course of a suit instituted in the Court of Chancery against the defendants and other parties, in compromising the same, and in carrying that compromise into effect, for which business the defendants jointly with the different persons stated in the plea were liable:—the plaintiff had received the sum of 30*l.*, which he had applied, and properly applied, in part liquidation of the above sum:—and the third was a claim made by the plaintiff upon the defendants for the costs of taxing a bill of costs of France, the former attorney of the defendants, to the amount of 14*l.* 10*s.* 1*d.*: but France had paid to the plaintiff the sum of 9*l.* for the costs of that taxation, which sum was a full compensation for the services rendered to the defendants by the plaintiff on that account. The plaintiff also proved that he had paid 4*l.* 13*s.* 4*d.* for the defendants, but without any authority from them for so doing. He gave no evidence of any account stated.

The defendants contended that, as the plea in abatement was proved as to one part of the plaintiff's claim, they were entitled to the verdict: while the plaintiff contended, that as it failed as to part, it failed altogether, or at least, that it was divisible; and that the plaintiff was entitled to recover as to that part to which the plea in abatement was not applicable.

If the Court should be of opinion that the defendants were right, the verdict was to be set aside and entered for them. If they should determine that the plea wholly failed, then the verdict to be entered for the plaintiff, damages 11*l.* 5*s.* If, however, the plea were divisible, then the verdict was to stand for 5*l.*

Gray for the defendants. Upon a count in *indebitatus assumpsit* against one defendant, the plaintiff cannot recover a debt due from the defendant alone, and also a debt due from the defendant jointly with another still living; though, if the co-contractor were dead, the two demands might be recovered under the same count; *Richards v. Heather*, 1 B. & Adol. 29; for every count must be single, and proceed on a single liability. And in *Richards v. Heather* the defendant was singly liable to the plaintiff for the two demands which he made; *Whelpdale's Case*, 5 Rep. 119; as appears by the kind of set-off *Richards* would have been entitled to if *Heather* had sued *Richards*: *Slipper v. Stidstone*, 5 T. R. 493; *French v. Andrade*, 6 T. R. 582. Here, the plaintiff proceeds, in his first count, on two distinct liabilities; the liability of the two defendants by themselves, and their liability jointly with others. But even if the plaintiff may include in his count the joint debt while the joint debtor is living, the defendant may assume that the action is brought for the joint debt, and plead in abatement the nonjoinder of the co-contractor; and if he so plead, the plaintiff should new assign in order to recover the separate debt. A plaintiff may new assign to a plea in abatement as well as to a plea in bar; 3 Chitty's Pleading, 1107; and such a course would be attended with no inconvenience to him; whereas, if the defendant were to plead in bar as to part, and in abatement as to the residue, and should discover, after issue joined, that, misled by the generality of the declaration, he had applied his plea in abatement to the separate debt, he would lose the benefit of the plea altogether, as it cannot be pleaded after four days: and such a plea would be ill, for it assumes that the count proceeds on two distinct liabilities of different kinds. The defendant, however, may plead in abatement to the whole.

as appears from *Colson v. Selby*, 1 Esp. 452, where the plaintiff sued in *assumpsit* to recover 1699*l.* 13*s.* 6*d.* for wines, a portion of which, to the amount of 1557*l.* 1*s.* 5*d.* had, according to the plaintiff's particular, been furnished to the firm of Selby and Towns, and the residue to Selby alone. Selby pleaded in abatement the nonjoinder of Towns, and Lord Kenyon ruled that the plaintiffs were bound by the particular they had given in; and that one of the articles being clearly on the partnership account, the defendant was well warranted in the plea he had pleaded; he therefore directed the plaintiff to be nonsuited. In *Freeman v. Crafts*, 4 Mees. & W. 4, and *James v. Lingham*, 5 New Cases, 553, (35 E. C. L. R. 225.) where it was held that a new assignment was not necessary, the plaintiff had not laid a sum in the declaration large enough to cover the whole debt, and the pleas, in effect, attempted to elude the real cause of action. The right to new assign is not confined to actions of trespass; *Chambers v. Jones*, 11 East, 406; *Greenhow v. Ilsley*, Willes, 619; *Lord Bagot v. Williams*, 3 B. & C. 235, (10 E. C. L. R. 62;) *Heydon v. Thompson*, 1 Adol. & Ell. 210, (28 E. C. L. R. 71;) nor to pleas in bar.

Butt, contra. 2 Wms. Saund. 210, is an express authority that a defendant may plead in abatement as to part, and *non assumpsit* as to the residue; and there is no authority for a new assignment to a plea in abatement, except the precedent in Chitty. As to the divisibility of the plaintiff's demand, there is no difference between a demand made in a single count, and demands made in many counts: upon a single count, the plaintiff may recover less than he demands. It is no answer to say that a part of the debt was contracted jointly with others, for the plaintiff having omitted to join them, can only recover damages in respect of the separate demand. *Colson v. Selby* is not reconcileable with subsequent authorities, nor intelligible upon any principle of pleading. A plea which professes to go to the whole cause of action, and covers only part, will not avail the defendant. Thus, in *Barnes v. Hunt*, 11 East, 451, to a declaration for several trespasses on the plaintiff's land on divers days, &c., the plea alleged, that at the said several days, &c., the defendant committed the said several trespasses, by license of the plaintiff; and the latter replied that the defendant of his own wrong, and without the cause alleged, committed the said several trespasses, &c.: it was held, that evidence of a license which covered some but not all of the trespasses proved within the period laid in the declaration, did not sustain the justification. Then, the plea here does not give the plaintiff a better writ as to the demand he is entitled to recover.

Gray, in reply, relied upon *Colson v. Selby* as a decision in point.

TINDAL, C. J. This is an action of *assumpsit* by an attorney against two defendants, for work and labour: the defendants plead to the whole in abatement that the promises were made by them jointly with others. the cause is referred to arbitration, and it is found that business to the amount of 5*l.* has been done for the two defendants, and to the amount of 36*l.* 5*s.* (of which 30*l.* has been paid) for the defendants jointly with others: and the question is whether, when it is found that all the contracts were not made with the defendants jointly with others, but one of them with the defendants alone, the defendants can be said to have succeeded in their plea; and I think they have failed to establish it. It is clear that, where there are several counts, the plaintiff may recover as to one only; and there is no reason why, on the same principle, the demand in a single count should not be esteemed divisible: in other

words, why the defendant should not plead that the action is brought in part for a contract on which he is jointly liable with others, and in part for one as to which he is singly concerned: instead of pursuing that course, the defendants here have pleaded in abatement to the whole of the plaintiff's demand, a plea which is not true in fact; and the plaintiff ought not to be injured by the generality of such a plea. The case does not differ from that where a defendant pleaded leave and license to an action brought for several trespasses, (*Barnes v. Hunt*,) and proved a license which applied only to some of them: it was objected, as here, that the plaintiff should have new assigned; to which the answer was, that, as the defendant had taken upon himself to plead a license to the whole, his evidence did not sustain the issue taken upon the replication, and that a new assignment was not necessary. So here, the defendant having pleaded the nonjoinder of others, as to all the contracts on which the plaintiff proceeds, and having shown that the objection applies to only one of them, the plaintiff was not called on to new assign; nor, indeed, has any authority been cited to show that there can be a new assignment to a plea in abatement.

It may be difficult to reconcile *Colson v. Selby* with our present decision; but if it be not reconcileable, I cannot agree with what is laid down in that case: it stands by itself, a *nisi prius* decision; and, though a motion was made to set aside the nonsuit, the matter was not much considered, for a rule was refused. Here the defendant has pleaded a plea to the whole of the plaintiff's demands, which is true only as to a part of them; being bad in part, therefore it is bad in the whole, and our judgment must be for the plaintiff, 11*l.* 5*s.*

BOSANQUET, J. I think the plaintiff is entitled to judgment for 11*l.* 5*s.* The entire demand made by the plaintiff was due partly from the two defendants, and partly from them jointly with others. The defendants put in a plea, in which they assert that the entire contract was entered into with them and others, and not with them alone, and that plea they fail to establish: the plaintiff, therefore, is clearly entitled to recover the sum due from the two defendants; the plea in abatement gives no better writ for that sum; and the issue on the plea being found for the plaintiff, the amount of damages to which he therefore becomes entitled is 11*l.* 5*s.* The case of *Colson v. Selby* was not much discussed, and cannot guide us on the present occasion.

MAULE, J. The plaintiff having declared for work and labour, the defendants having pleaded that the contract was entered into with others besides themselves, and the arbitrator having found that a part of the work was done for the defendants alone, the question is, how the issue is to be determined. The meaning of the declaration is, not that the defendants are indebted to the plaintiff in the precise amount named, but that the plaintiff undertakes to make out that the defendants are indebted to him in some amount, not exceeding it. The defendants, by their plea, undertake to show that, to whatever amount the plaintiff shall make himself out to be entitled, that amount is due from others jointly with the defendants. In that allegation they have failed, and therefore the issue must be determined in favour of the plaintiff. As to the case of *Colson v. Selby*, if it be correctly reported, it is at variance with what we now decide; but if the facts had been more fully stated, it might turn out not to be inconsistent.

Judgment for the plaintiff

COLTMAN, J., was absent.

FRANCE and HILL v. WHITE and WILLIAMS.—p. 33.

A. and B., as partners, sued defendants for work and labour done in the matter of an executorship :

Held, that defendants could not set off money received by A. before the partnership, on account of testator's estate, notwithstanding B. had at that time assisted A. in the matter of the executorship, and A., after the partnership, had admitted the receipt of the money.

UPON a reference by order of nisi prius, the arbitrator directed that the verdict, which was entered generally for the plaintiffs, should be set aside, and a verdict be entered for the defendants on all the issues, subject to the opinion of the Court upon the following facts :—

The declaration contained three counts in assumpsit ; the first was 'or 200*l.*, for work and labour of the plaintiffs as attorneys for the defendants ; the second for 200*l.* for money paid by the plaintiffs to the defendants' use ; the third on an account stated. The defendants pleaded, first,—except as to 27*l.* 19*s.* 3*d.*,—that they never promised ; secondly, payment ; thirdly, a set-off of money had and received by the plaintiffs to the defendants' use, and on an account stated. In the replication the two last pleas were traversed.

For some time previous to July, 1831, the plaintiff, France, was carrying on business as an attorney and solicitor at Worcester, under the style of France and Hill, the present plaintiff, Hill, being his clerk and the son of a former partner. In July, 1831, the two plaintiffs entered into partnership, and continued in partnership until November, 1833. The defendants were the executors of one Mary Griffiths, and had employed the plaintiff, France, as their attorney in the management of the estate, up to the time of the partnership, and continued to employ him after the partnership, of which no notice was given to them. Both of the plaintiffs were personally engaged in the business of the defendants. Various sums of money belonging to the estate had come into the hands of France, but all prior to the partnership. In April, 1832, there was a meeting of the executors and the parties interested in the estate at the office of the plaintiffs, when a statement of the executors' accounts with the estate was made out by the clerk of the plaintiffs, by which it appeared that there was a certain balance due to the different legatees. At that meeting Hill was not present ; but the plaintiff, France, stated that a sum of 15*l.* was to be retained by the executors to meet any further bill on account of France and Hill, which item, as well as another, for the payment of additional duties, was entered at the foot of the account before the final balance was struck. Those sums, and more, were then in France's hands. Of the state of the accounts between France and Hill, the arbitrator had no knowledge. Additional probate and legacy duties were afterwards paid by the plaintiffs ; and business was done by them on behalf of the defendants, for which the present action was brought ; but the whole amount of their bill was fully covered by the amount of the moneys belonging to the estate, so received by the plaintiff, France, and never paid over to the executors.

It was objected, on the part of the plaintiffs, that the defendants could not set off any moneys received by France alone against the debt incurred by them with the partnership ; and that the declaration by France, referring as it did to the receipt of money previously to the partnership, could not bind Hill, and therefore could not be treated as

any admission by the plaintiffs of money in their hands belonging to the defendants.

If the Court should be of opinion that these facts supported the plea of payment or set-off, both or either of them, the arbitrator ordered that the verdict thereon should be entered for the defendants accordingly; otherwise that it should stand for the plaintiffs.

Bull, for the plaintiffs. The award is ill; for the money received by France before his partnership, which constitutes a separate debt from him to the defendants, cannot be set off against the joint claim of France and Hill; *Jones v. Fleeming*, 7 B. & C. 217, (14 E. C. L. R. 32;) *Pulziamy v. Noble*, 3 Meriv. 593. There is nothing to show any agreement to allow a set-off of the separate debt; and if any such agreement existed, it ought to have been pleaded: *Kirwan v. Kirwan*, 4 Tyrwh. 491; *Kinnerley v. Hossack*, 2 Taunt. 170.

Gray, for the defendants. If the facts stated on the award had been proved before a jury, and the jury had found for the defendants, the Court would not have disturbed the verdict. There is enough to lead to the inference that the money received by France was applied to the partnership business, and if so, the arbitrator might fairly treat it as a debt due from the partnership.

Bull, in reply. If France had been sued for the money so received before the partnership, he could not have set off against such demand work done by the partnership.

TINDAL, C. J. I have looked with anxiety to see a ground on which this award might be supported; but I think the objection must prevail.

The action is brought by two attorneys for work done, for money paid, and on an account stated. The defendants have pleaded the general issue, a set-off, and payment.

The cause—not all matters in difference, but the cause—is referred to arbitration; we must therefore look to the record to see whether the arbitrator has come to a right conclusion or not. It is contended that the plea of set-off may be supported by the evidence which the arbitrator has set out; but I think not; for I see no evidence of any joint debt from the plaintiffs to the defendants: there is no plea that Hill was a dormant partner when the money was received; and if the defendants had sued France for the money, he could not have set-off against such demand work done by himself and his partner. Then, as to the plea of payment, if there were any agreement that the money so received by France should go in payment of the partnership claim, such agreement should have been pleaded that the plaintiffs might have the opportunity of traversing it.

BOSANQUET, J. To support the plea of payment it ought to appear that the money came to the hands of the plaintiffs: a previous agreement, that money in the hands of one should be applied to the claim of both, cannot satisfy the bare plea of payment, and I cannot see that Hill was bound by what passed between the defendants and France, before the partnership.

Then, as to the plea of set-off; there is no proof that the money came to the hands of the plaintiffs after their partnership, and yet the plea is, that they were both indebted.

If the defendants had sued France for money received before the partnership, he could not have set off the partnership bill.

COLTMAN, J. I am of the same opinion. There was no set-off to

be claimed against the plaintiffs unless it was created by what passed at the meeting between France and the defendants. But that meeting was held *alio intuitu*; it was to settle the account as to the executorship alone: there was no settlement of the account with France, nor any transfer to the firm of the debt due from him.

Judgment for the plaintiffs.

MAULE, J., was absent.

BEESELY against DOLLEY.—p. 37.

Payment may be pleaded generally to all the counts of a declaration; and if it be alleged to have been made after the cause of action accrued, it is immaterial that the day actually specified is a day before the cause of action accrued.

THE plaintiff declared that the defendant was indebted to him on the 1st of February, 1837, in 40*l.* for horses; 40*l.* for carriages, and 40*l.* on an account stated, whereby an action had accrued to the plaintiff to demand 120*l.*: breach, non payment.

As to all the demands, except 16*l.* 8*s.*, the defendant pleaded, that after the making of the several supposed contracts in the declaration mentioned, except as aforesaid, before the commencement of this suit, to wit, on the 12th of October, 1827, and on divers other days and times between that day and a certain other day, to wit, the 1st of April, 1828, the defendant paid to the plaintiff divers sums of money, amounting in the whole to all the moneys in the declaration mentioned, except as aforesaid, in full satisfaction and discharge of all those moneys, except as aforesaid, and of all damages sustained by the plaintiff by reason of the detention thereof; and the plaintiff then accepted and received the same of and from the defendant in full satisfaction and discharge accordingly: and to the 16*l.* 8*s.*, a set-off.

Demurrer. For that it did not appear by the said plea in respect of which counts or causes of action in the declaration contained, the payments in the said plea mentioned were made; and it was altogether uncertain which of the debts, contracts, and causes of action the defendant alleged to be paid and satisfied, and which he admitted to be due and unsatisfied: and also for that it appeared by the said plea, that the payments in the plea mentioned were made long before the debts in the declaration mentioned were stated to have been due, and, therefore, such payments could not have been made in satisfaction of the debts in the declaration mentioned.

Joinder.

Kelly, in support of the demurrer, said it had been framed on the authority of *Mee v. Tomlinson*, which subsequent cases (a) appear to have overruled, and payment may now be pleaded generally to all the counts of a declaration; but he contended that in the allegation of payment the pleading must be limited to some time consistent with the demand on record, and that the defendant could not be allowed to plead that the payment was made before the period when the debt appeared to have accrued. In *Ring v. Roxbrough*, 2 Tyrwh. 468, BAYLEY, B., said "Time and place must be laid in pleading every material fact. It

(a) See *Jourdain v. Johnson*, 2 Cr. M. & R. 564; *Marshall v. Whiteside*, 1 Mee. & Welsb 182 *Lorymer v. Vizeu*, 3 New Cases, 222, (32 E. C. L. R. 93.)

was essential to lay a date to the allegation that the defendant was indebted to the plaintiff; and it would not have been sufficient to state merely that the defendant on a certain day promised to pay."

TINDAL, C. J. The allegation that the payment was made after the cause of action accrued, renders it unnecessary to specify any particular day.

The rest of the Court concurred in giving

Judgment for the defendant.

**BYERS and Another, Assignees of JOHN CLARK, a Bankrupt,
against SOUTHWELL.—p. 39.**

Under 6 G. 4, c. 16, where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the chancellor orders the commission to be proceeded in on proof of a sufficient debt by any other creditor, the debt of the second may be added to that of the first, to make up the requisite amount.

TROVER, by the assignees of John Clark, a bankrupt. Plea, That the fiat in bankruptcy against Clark, under which he became a bankrupt as in the declaration mentioned, was issued on the 28th of July, 1837, on the petition of certain persons, to wit, William Byers and Sarah Taylor Watson, John Austin and John Brunswick Austin, and Arthur Beloe and William Fisher, claiming to be creditors of the said John Clark; and that there was not before or at the time of issuing the said fiat any debt or debts due or accruing due to W. Byers and S. T. Watson, J. Austin and J. B. Austin, and A. Beloe and W. Fisher from J. Clark sufficient to support the said fiat according to the statute in force concerning bankrupts. Verification.

Replication: That after J. Clark was adjudged a bankrupt under the fiat in the plea mentioned, and before the commencement of this suit, to wit, on the 26th of May, 1838, John Samuel and James Sloper, and also the said S. T. Watson and W. Byers, and J. Austin and J. B. Austin, having then due and owing to them from the said J. Clark, and having before then proved under the fiat debts sufficient to support the said fiat, (the debts so due and owing from J. Clark to J. Samuel and J. Sloper having been incurred not anterior to the debt of any of them, the said W. Byers and S. T. Watson, J. Austin and J. B. Austin, and A. Beloe and W. Fisher,) did duly present their petition to the Chief and other Judges of the Court of Review at Westminster, praying that it might be referred to the commissioners named in or acting under the fiat, to inquire whether the debts of the petitioners S. T. Watson and W. Byers, J. Austin and J. B. Austin, and the debt of A. Beloe and W. Fisher, therein also mentioned, were insufficient to support the fiat; and whether the debt of the petitioners J. Samuel and J. Sloper was or was not incurred not anterior to the debt of the petitioning creditors' debt on which the fiat issued, which debt was formed by the debt of the firm of A. Beloe and W. Fisher, and the debts of the petitioners S. T. Watson and W. Byers, and J. Austin and J. B. Austin; and if the commissioners should find that the debts of the petitioners S. T. Watson and W. Byers, and J. Austin and J. B. Austin, and the debt of A. Beloe and W. Fisher were insufficient to support the fiat, and that the debt of the petitioners J. Samuel and J. Sloper were incurred not

anterior to the joint petitioning creditors' debt on which the *fiat* issued, then that the debts of all the said petitioners might be substituted for the debts of the petitioners S. T. Watson and W. Byers, J. Austin and J. B. Austin, and A. Beloe and W. Fisher: and thereupon the Court of Review did afterwards, to wit, on, &c., and before the commencement of this suit, find that the debt of A. Beloe and W. Fisher, on which, with the debts of the petitioners S. T. Watson and W. Byers, and J. Austin and J. B. Austin, the adjudication of the bankruptcy of the said J. Clark was made, was an insufficient debt with the debts of the last-mentioned petitioners to support the *fiat* issued against the bankrupt; and that the debt of the petitioners J. Samuel and J. Sloper proved by them under the *fiat*, or so much thereof as was sufficient with the debts of the petitioners S. T. Watson and W. Byers, J. Austin and J. B. Austin, to support the said *fiat*, was incurred not anterior to the debt of A. Beloe and W. Fisher, and to the respective debts of the last-mentioned petitioners, and was an existing and sufficient debt with the debts of the last-mentioned petitioners to support the *fiat*: and thereupon the Court did then, to wit, on, &c., and before the commencement of this suit, order that the *fiat* should be proceeded in according to the form of the statute in that case made and provided; as by the record and proceedings thereof remaining in the said Court more fully appeared; which order still remained in full force and effect, and not in anywise annulled or discharged: verification.

Demurrer, For that the replication alleged the order of the Court of Review to have been awarded on the petition of creditors who petitioned for the *fiat* in bankruptcy, whereas the said petition, on which the order of the Court of Review was made, ought to have been made by some creditor or creditors other than those who petitioned for the *fiat*: that the replication should have shown that the debt or debts found sufficient by the Court of Review, were other and different debt or debts than those on which the *fiat* was issued, and not part of the same debt or debts: that the replication did not allege that the whole of the debts of the petitioner to the Court of Review were incurred not anterior to the debt or debts of the parties who petitioned for the *fiat*: that the replication should have alleged and shown that the commissioners, in pursuance of the petition, found the petitioning creditors' debts insufficient; and that the debts to be substituted were sufficient, and incurred not anterior to the petitioning creditors' debts: that the powers given to the Court of Review by statute did not appear to have been properly pursued: and that it should have been alleged that the order of the Court of Review was under the seal of the said Court, and made without prejudice to any action then pending.

Joinder.

Barstow, in support of the demurrer, referred to the language of sect. 18, 6 G. 4, c. 16, which provides that where a petitioning creditor's debt shall be found insufficient to support a commission, it shall be lawful for the Chancellor upon the petition "of any *other* creditor or creditors *having proved any debt or debts sufficient to support a commission*, to order the commission to be proceeded in;" and contended that the new debt proposed to support the commission, ought to be due exclusively to creditors other than those who set up the first petitioning creditors' debt, and that a debt of such other creditors, in addition to that of the first petitioners, would not fall within the meaning of the statute.

[TINDAL, C. J. You can assign no reason for such a construction : *any other* means any other in addition to the first set of petitioners.] Then, there should have been a distinct averment that Watson and Byers were partners, and that J. Austin and J. B. Austin were partners; for that is not necessarily to be implied under the copulative *and*, and unless *they were* partners, the petitioning creditors' debt might not be sufficient under sect. 15, which requires 100*l.* as a petitioning creditors' debt for one creditor, or two or more, being partners; 150*l.* as the debt of two, and 200*l.* as the debt of three or more.

TINDAL, C. J. You might take issue on the sufficiency of the debt. The statute does not require that the *fiat* should disclose the precise nature of the petitioning creditors' debt. I think the replication is sufficient.

Per Curiam,

Judgment for the plaintiffs.

HOWELL against BRODIE.—p. 44.

Defendant from 1829 till 1833, advanced various sums with a view to a partnership in a market about to be erected; knew that the money was applied towards the erection; and was consulted in every stage: in October, 1833, by a written agreement, it was settled that the market should be valued, and that defendant should have a seventh share: Held, that he was not liable as a partner till October, 1833, notwithstanding profits had been made, but not accounted for to him, before that time.

IN *assumpsit* for work and materials, the plaintiff, as the builder of Portman Market, Marylebone, sought to recover of the defendant 10,000*l.*

The defendant pleaded *non assumpsit*; and the question was, whether, at the time of the building, he had been a partner with Mr. Thomas Wilson, who projected the market.

The evidence in the cause consisted of the examination of Mr. Wilson, taken under a judge's order, previously to his quitting England, an agreement between him and the defendant, entered into October 15, 1833; and a demand on, and a refusal by the defendant, to produce his banker's book.

In his examination, Wilson stated, in effect, that he had projected the market; had, on his own credit, employed the plaintiff in the erection of it; and, in 1832, became alone tenant to the Lord Portman of the ground on which it stood.

That the buildings erected by the plaintiff were completed before October, 1833.

That in 1829, he (Wilson) applied to the defendant, professionally, to draw the act of parliament for establishing the market, and shortly afterwards the defendant expressed a wish to take some interest in the concern.

"A conversation took place (were the words of Wilson) between me and Mr. Brodie on that last occasion, as to what I supposed the market would cost: I told Mr. Brodie that I thought what we then proposed to do would cost about 6000*l.* He did not then make any proposal as to taking any share."—"My impression is, that it afterwards passed in

words between us, that Mr. Brodie was to take the half of such a thing as would cost 6000*l*.”—“In the first instance it was only intended to have a pitching market, such as is found in the continental cities. In that case the paving would have been the chief expense. Perhaps some stands would have been furnished by the sellers: that was communicated to Mr. Brodie: it was on that idea he proposed to take a half at 6000*l*.”—“In order to induce the hay salesmen to come to the Portman Market, it was necessary to erect covered hay sheds. They were erected, and were very expensive.”—“I conferred with Mr. Brodie as to the increase of expense: it led to an alteration as to Mr. Brodie taking the half. From that moment I gave up the idea of his taking half. I did not at that time propose to him taking any other share.”—“No distinct proposal was made as to any particular share he was to take. My wish was, as communicated to Mr. Brodie, that he should take one-fourth share, provided the expenses did not exceed what we then contemplated—I should say about 25,000*l*., which I named to Mr. Brodie, and to which he did not object. I don’t remember what Mr. Brodie said; I considered he acquiesced in that proposal.”—“It was a matter of honour on both sides. Upon the same principle it was, of course, open, as I have said, to Mr. Brodie, to the last, to take a share or not. I recollect being asked whether I could have made any legal objection to Mr. Brodie objecting to take a share till October, 1833. My answer was—I presume not, but that I should be at his mercy.”

At length, the whole expense amounted to 50,000*l*., when it was agreed, in writing, that the defendant should have one-seventh share. This was in October, 1833.

The defendant was consulted in every stage of the proceeding; knew that the plaintiff was employed in the latter portions of the work; and between 1839 and 1833, advanced to Wilson, at different times, 14,000*l*., which money he knew was expended on the market.

On these sums he received no interest, nor did Wilson ever render any account, although profits to the amount of 1500*l*. had been received from the market before 1833; but other sums of the amount of 4000*l*. were lent by him to Wilson during the same period, and afterwards repaid with interest.

By the agreement of the 15th of October, 1833, between the defendant of the one part, and Wilson of the other, a surveyor was to determine the sum at which the market should be valued as between the defendant and Wilson. The defendant was to be entitled to one individual seventh part of Portman Market for the term of years for which Wilson held the same of Lord Portman, and to take that seventh in satisfaction for so much of the sum of 9600*l*. which the defendant had advanced to Wilson, as should be equal to one-seventh of the sum at which the market should be valued. The defendant engaged to advance to Wilson 5000*l*. more, for the purpose of enabling him to discharge such of the demands on him, on account of the market, as remained unsatisfied. If that sum should be insufficient for the purpose, in order to discharge all unsatisfied demands on account of the market, Wilson was to be allowed to borrow the requisite sums by mortgage of the market, in addition to the 13,000*l*. for which the market was then mortgaged. But the defendant’s seventh was not, as between him and Wilson, to be liable to that 13,000*l*., or to any further sum for which the market might be mortgaged.

The 5000*l.* and 2070*l.*, part of so much of the 9600*l.* as would remain after deducting one-seventh of the sum at which the market should be valued, with interest at 4 per cent., were to be secured to the defendant's trustees by a mortgage of Wilson's estate in Wales. If any part of the 9600*l.* should remain, after deducting the seventh of the sum at which the market should be valued, and the 2070*l.*, then Wilson was to pay to the defendant the sum remaining, with interest at 5 per cent. If one seventh of the sum at which the market should be valued, together with the 2070*l.*, should exceed 9600*l.*, then the defendant was to take upon himself so much of the 13,000*l.* secured on mortgage of the market, as should be equal to the excess of the one-seventh and 2070*l.*, over 9600*l.*

Upon this evidence it was left to the jury to say, whether the defendant and Wilson had a joint subsisting interest at the time when the work was done; and the jury gave a verdict for the defendant, finding that there was a partnership from October, 1833.

Wilde, Serjt., obtained a rule *nisi* for a new trial, on the ground that this verdict was against the evidence. He contended that, after the defendant had advanced his money for a share in the intended market, and knew that the money was applied in its erection, he might, by a bill in Chancery, have compelled Wilson to render an account of the profits from the beginning of the concern, and pay over a fair proportion to the defendant. If so, he was strictly a partner from the time of the first advance. In respect of that, and the subsequent advances, he could not have sued Wilson for money had and received to his use. The postponement of the execution of the written agreement till October, 1833, did not show that no interest existed previously, but only defined the amount of it; and the lease granted by Lord Portman to Wilson, in 1832, must be considered as granted to him in trust for the person jointly interested.

The *Attorney-General* and *Talfourd*, Serjt., who showed cause, argued that all the negotiations and advances previous to October, 1833, were in contemplation of and introductory to, a partnership, but conferred no actual interest. They referred to *Dickinson v. Valpy*, 10 B. & C. 140, (21 E. C. L. R. 41,) and *Fox v. Clifton*, 6 Bingh. 776, (19 E. C. L. R. 233.)

Wilde and *Hoggins* were heard in support of the rule.

TINDAL, C. J. The question is, whether upon the evidence before them, the jury have come to a wrong conclusion; and upon the best consideration I can give the case, I think the verdict ought not to be disturbed.

The question left to the jury was composed partly of law, but principally of fact; that is, whether at the time the work was done by the plaintiff, a partnership existed between Wilson and the defendant. That a partnership was intended there can be no doubt; because, by the written agreement of October 15th, 1833, the defendant takes one-seventh of the whole concern; but it removes much doubt from the case that there *was* an agreement for the partnership to begin from that day; for the language of that instrument applies to a partnership commencing from that day, and not from any antecedent period. By the first stipulation, a surveyor is to determine the sum at which the market is to be valued, as between the defendant and Wilson; and by the

second, the defendant is to be entitled to a seventh part of the market, for the term during which Wilson held the same.

It has been contended that this merely ascertains the interest which existed before, and that it must have a retrospective operation to entitle the defendant to his share of the profits from the commencement of the concern. But I think it operates only from the date of the instrument, during the continuance of Wilson's term. Other language would have been used, if it had been intended to give it a retrospective operation.

If, then, the agreement shows that a partnership commenced in October, 1833, is there any thing in the previous conversations between the defendant and Wilson, from which the jury could with propriety infer that any joint interest existed before? He says, "a conversation took place as to what I thought the market would cost: I told him about 6000*l*.: he did not *then* make any proposal as to taking any share." What we have to determine is, whether the defendant took any then present interest; but the expressions of Wilson are so indefinite that the interest of the parties ought not to be bound by them: "*My impression* is, that it passed in words between us that the defendant was to take the half of such a thing as would cost 6000*l*." Taking this language strictly, it can only refer to a future interest: as in the case of building a ship, if a person were to say, "after it is built, I am willing to become a part owner," that would never give the builder a right to sue him for the expense of building: then he goes on—"I conferred with Mr. Brodie as to the increase of expense. It led to an alteration as to Mr. Brodie taking the half: from that moment I gave up the idea of his taking half: I did not at that time propose to him taking any other share."—"No distinct proposal was made as to any particular share he was to take. My wish was, as communicated to Mr. Brodie, that he should take one-fourth share, provided the expenses did exceed what we then contemplated, I should say about 25,000*l*., which I named to Mr. Brodie, and to which he did not object. I don't remember what Mr. Brodie said. I considered he acquiesced in that proposal."

The question is, whether these conversations are sufficient to establish an intention to take a present interest, or whether they were only preparatory to a future partnership. There are, no doubt, some points on which a difficulty may arise, but that of itself does not afford sufficient ground for sending the case down to a second trial. It may be difficult to say why no account of profits was rendered previous to October, 1833; that is in favour of the defendant: it may be difficult to say why he received no interest on the sums advanced: that may appear to operate against him; but such difficulties do not furnish sufficient grounds for disturbing the verdict, and therefore this rule must be discharged.

BOSANQUET, J. I think there is no reason for disturbing this verdict. The question is, whether a partnership was subsisting between the defendant and Wilson at the time the work was done: there can be no doubt a partnership was intended; and in order to constitute a partner, it is not necessary that the amount of his share should be distinctly ascertained; but the omission to ascertain it is a strong circumstance to show that no partnership exists, and the burden of proof is cast upon the plaintiff. There are two species of evidence here: the defendant's conversations with Wilson, and the written agreement of October, 1833. It is clear that the agreement constitutes a partnership from that time

and it is evidence to go to the jury as to what the relation between the parties was; but the statement of Wilson discloses no express contract, though there are circumstances mentioned which operate both ways: the strongest thing in favour of a partnership is the statement that the defendant knew that the advances he made were applied towards the market; but Wilson also states that he thought he was at the mercy of the defendant, and if so, there was no mutual obligation between them. The omission to settle what share the defendant should take, is a circumstance in favour of the defendant; his omission to demand any interest on the money advanced, makes in favour of the plaintiff. But all these circumstances were subjects for the consideration of the jury, and I see no reason for being dissatisfied with the verdict. By the agreement of October, 1833, the defendant was to have an interest during the term granted to Wilson, and it has been contended that that stipulation gave him an interest in it from the commencement of the term in 1832. I cannot accede to that proposition; but if it were correct, it would not necessarily make him a partner in the antecedent profits of the market.

COLTMAN, J. The agreement does not constitute a partnership except from the date of the instrument. The other evidence, though loose, is not inconsistent with that construction, or with the notion that the defendant advanced his money with a view to a partnership, when the market should be finished. There is no ground for impeaching the good faith of the agreement, and therefore the rule must be discharged.

ERSKINE, J. There are certainly many circumstances which seem to support the argument for the plaintiff; but there are others which have the opposite tendency; and when I consider that the burden was cast on the plaintiff to make out the partnership, I am not disposed to disturb the verdict; and the less so, because, as it seems to me, the weight of the evidence is in favour of the conclusion that there was no joint interest before the agreement of October, 1833. All I collect from it is, that the defendant advanced his money with the intention that, if on the completion of the market he should wish to have a share in it, Wilson should make it over to him: that was done in October, 1833; and I cannot infer from that circumstance that any partnership existed before.

Rule discharged.

HEY against MOORHOUSE and Others.—p. 52.

1. Where a tenant was to hold land according to certain rules in writing under which a former tenant held, but the length of his term was agreed on orally, Held, that to show the expiration of the term it was not necessary to produce the rules:
2. That the lessor, having entered at the expiration of the term, might sue in trespass persons claiming under the late tenant as well as the late tenant himself:
3. Issue having been taken as to the existence of an agreement between the lessor and the late tenant in satisfaction of all demands, Held, that proof of the consideration of the agreement could not be required.

THIS was an action of trespass for breaking and entering the plaintiff's close, damaging the gates and fences, mowing the grass, corn, and hay, and carrying them away.

The defendants pleaded first, not guilty; 2. That the plaintiff was not possessed at the time when, &c.; 3. That the trespasses were committed by the defendants jointly with one George Cooke, and that none of

them were committed alone without the said George Cooke ; that after the committing them, on the 24th of July, 1838, certain disputes were pending between the said George Cooke and the plaintiff, amongst other things, in respect of a certain farm then lately occupied under the plaintiff ; and also touching certain other claims of the plaintiff against the said George Cooke, amongst other things, in respect of the causes of action in the declaration mentioned ; that thereupon, on the day and year last aforesaid, it was agreed between the plaintiff and the said George Cooke, that he, Cooke, should abandon, and that he did abandon his said claims and demands against the plaintiff, and the plaintiff agreed to relinquish and did relinquish all claims against Cooke in respect of the causes of action in the declaration mentioned ; and Cooke then entered into and made the said agreement with the plaintiff, and the plaintiff then accepted the said agreement in full satisfaction and discharge of all the trespasses and causes of action in the declaration mentioned, and of all damages sustained by reason thereof.

The plaintiff joined issue on the first and second pleas ; and replied to the third, that the said George Cooke did not enter into nor make the said agreement with the plaintiff in the last plea mentioned, nor did the plaintiff accept the said agreement therein mentioned in full satisfaction and discharge of the trespasses and causes of action in the declaration mentioned, and of the damages sustained by reason thereof. Whereupon issue was joined.

The cause was tried at the last Lent assizes for Yorkshire before PARKE, B., when it was proved by the plaintiff's agent that he let a farm to Cooke by parol, his holding to commence on the 2d of February, 1836 : and that he was to hold according to rules under which the former tenant held. The rules were in writing, and were not produced, but the length of the term was agreed by parol. Cooke entered into possession on the 2d of February, 1836 ; and he occupied no other farm under the plaintiff but the farm in question, situated at Pudsey.

Notice to quit the land on the 2d of February, 1838, and the barns on the 1st of May, was proved.

On the 2d of February, the agent of the plaintiff went on the premises to take possession pursuant to the notice, and required Cook to give up possession, which he refused. Cooke held over, claiming for management and improvement. The plaintiff resisted his claim, and paid nothing, but sent a valuer over. The precise nature of Cooke's claims did not appear.

In June, Cooke advertised a sale of his effects, and, *inter alia*, ten acres of mowing hay. On the 27th of June, the day of sale, notice was publicly given that the sale was illegal : notwithstanding which the hay was sold by the authority of Cooke, and the action was brought against the defendants for going on the premises and taking it away.

On the 24th of July, 1838, the plaintiff and Cooke signed the following agreement, which the defendants put in evidence in support of the third plea. "I, the undersigned George Cooke, do hereby acknowledge that I have no claim or demand whatsoever against William Hey, Esq. for or in respect of my farm at Pudsey, lately occupied under him, or for or in respect of any notices or proceedings whatsoever taken by him in order to obtain possession of the same farm held over by me, and in order to prevent the wrongful removal by me of the crops growing thereupon and in consideration of the foregoing undertaking, I, the

said William Hey, do hereby relinquish all claims against the said George Cooke for *mesne* profits and rent, or for holding over the said farm. Witness our hands, &c."

PARKE, B., thought that the plea must be construed to import that Cooke had a legal or colourable claim to *mesne* profits, the renunciation of which would be a consideration for the plaintiff's agreement; and as no evidence was given of any such claim, he thought the plea was not proved, and directed a verdict to be found for the plaintiff, with leave for the defendants to move to set it aside, and enter a non-suit instead, or a verdict for the defendants on the third plea.

R. Alexander moved accordingly, on the ground,

First, that the plaintiff should have produced the written rules under which Cooke held the premises; it might have appeared from them that Cooke had still an interest as outgoing tenant in June, 1838.

Secondly, that the entry of the plaintiff by his agent in February, 1838, did not revest the possession in the plaintiff; at all events not as against the defendants, who entered under the authority of Cooke.

Thirdly, that the third plea had been well proved by the agreement produced; for the replication, by raising an issue on the existence of the agreement, excluded any question as to the sufficiency of the consideration.

A rule *nisi* having been granted,

Cresswell and Wortley showed cause.

The written rules, according to which the tenant was to cultivate the farm, were immaterial: the question was whether or not he was in lawful possession at the time in question; and, as the duration of his interest was settled by oral agreement, the termination of that interest was sufficiently proved. After the agent of the plaintiff had entered peaceably on the 2d of February, the plaintiff was entitled to maintain trespass, and Cooke's possession was unlawful. It was immaterial whether the agent declared the purpose of his entry or not, provided he did any act to show his intention; *Butcher v. Butcher*, 7 B. & C. 399, (14 E. C. L. R. 59;) Co. Lit. 245. Then, the agreement with Cooke was no answer to the action. Cooke had no legal or colourable claim against the plaintiff, and, therefore, there being no consideration for the agreement, it was void, and must be deemed as not in existence. Besides, the action was not brought for any thing within the scope of the agreement, i. e. *mesne* profits, rent, or holding over, but for a trespass, in taking away the plaintiff's crops.

R. Alexander and W. H. Watson, in support of the rule. The written rules under which Cooke occupied not having been produced, the Court was not furnished with the best evidence of the plaintiff's alleged right to sue. The case resembles *Cotterill v. Hobby*, 4 B. & C. 465, (10 E. C. L. R. 379,) where, in case for an injury done to the plaintiff's reversionary interest in land, by cutting and carrying away branches of trees growing there, it appeared in evidence that the land was let by the plaintiff to the occupier under a written agreement: It was held, that the plaintiff was bound to produce it. And, though the action might lie against Cooke, it did not therefore lie against the defendants. The plaintiff might have a constructive possession as against Cooke, by reason of the entry of his agent; but the principle of *Butcher v. Butcher* did not apply against third persons; and, according to *Liford's Case*, 11 Rep. 56 a, though a dissee who enters may maintain trespass against the disseisor for acts done before re-entry, he cannot maintain it against

those who claim title under the disseisor. As to the agreement with Cooke, a disputable claim is a sufficient consideration; *Longridge v. Dorville*, 5 B. & Ald. 117, (7 E. C. L. R. 43;) Com. Dig. *Action on the Case, Assumpsit*, F. a; and according to *Dufresne v. Hutchinson*, 3 Taunt. 117, a release to one of several tortfeasors is available to all.

Cur. adv. vult.

The case having been argued before BOSANQUET, COLTMAN and ERSKINE, J. J., in the absence of the lord chief justice,

BOSANQUET, J.,—after stating the pleadings and facts, *as ante*, page 276, 277,—now pronounced the judgment of the Court:—

Three objections have been made, the first objection is, that the nature of the tenancy ought to have been shown by the production of the written rules, according to which it was proved that the tenant was to hold. To which the answer is, that under the plea denying the possession of the plaintiff, it was only necessary to prove the extent of the tenant's term, which was proved to have been agreed to by parol, and did not therefore depend upon the written rules. The second objection is, that the entry of the plaintiff by his agent, either on the 2d of February or on the 27th of June, when the sale took place, was insufficient to revest the possession in the plaintiff, so as to make the defendants trespassers. That the entry of the agent on the 2d of February, when the tenancy expired, for the express purpose of demanding possession, and the demand made accordingly, were sufficient to revest the possession in the plaintiff, was scarcely disputed. The case of *Butcher v. Butcher* is decisive on this point; and it is there said, that it is not necessary that the party who makes the entry should declare that he enters to take possession: it is sufficient if he does any act to show his intention. But it is said, that although the plaintiff might maintain trespass against Cooke, the tenant, he cannot maintain such action against the defendants, who entered by authority of Cooke to purchase the crops of him. And *Liford's Case* is cited; in which it is laid down, that although a disseisee, who enters, may maintain trespass against the disseisor for acts done before entry, he cannot maintain such action against those who claim by title from the disseisor for acts done by them after the disseisin and before re-entry: and it is contended, that as the tortious possession of Cooke commenced on the 2d of February, and the acts of the defendants were committed subsequently to that period, they are not liable to be sued as trespassers before a fresh entry by the plaintiff. The answer to this argument is, that there has been no disseisin, nor any title acquired by the defendants from a disseisor. The plaintiff having regained possession of the land by his peaceable entry upon the unlawful possession of his tenant, and being entitled to treat his tenant as a trespasser, all those who came upon the land without title after such revesting of his possession, were trespassers also, and were liable to be sued as such. The two first objections, therefore, are unfounded.

The third objection is, that the direction of the learned judge with respect to the third issue, was not correct. He thought, as he states in his report, that the claim on Cooke and the defendants was a claim for mesne profits, and that satisfaction with regard to one was an answer as to all; but he thought that the plea was not proved, because, in order to make it a good plea, it must be construed to import that Cooke had a legal claim on the plaintiff, or at least a colourable legal claim:

that is, a *bonâ fide* disputable claim to a legal right in respect of the farm, which would be a good consideration for the agreement, and which he gave up as a consideration for the plaintiff giving up his claim for mesne profits; and as there was no proof of such right or claim, he held that the plea was not proved; reserving the point for the consideration of the Court.

The agreement proved at the trial, was as follows:—"I, the undersigned, George Cooke, do hereby acknowledge that I have no claim or demand whatsoever against William Hey, Esq., for or in respect of my farm at Pudsey, lately occupied under him, or for or in respect of any notices or proceedings whatsoever, taken by him in order to obtain possession of the same farm held over by me, and in order to prevent the wrongful removal by me of the crops growing thereupon; and in consideration of the foregoing undertaking, I, the undersigned, W. Hey, do hereby relinquish all claims against the said George Cooke, for mesne profits and rent, or for holding over the said farm: Witness our hands, the 24th July, 1838."

If it were necessary that the pendency of disputes between Cooke and the plaintiff should be proved at the trial, it might be necessary that the claims of Cooke should be shown to be of such a nature as would afford a sufficient consideration for the agreement pleaded. But the existence of the claims, as pleaded, does not appear to have been put in issue. The plea states that certain disputes were then pending between Cooke and the plaintiff, touching and concerning certain claims of Cooke against the plaintiff (*inter alia*) for and in respect of a certain farm, then lately occupied under the plaintiff. The replication, which denies the making of the agreement by Cooke, and the acceptance of it by the plaintiff in satisfaction, admits the existence of disputes touching certain claims of Cooke, as pleaded in respect of a farm lately occupied under the plaintiff. The only farm which Cooke occupied under the plaintiff, was proved to be the farm at Pudsey. The agreement produced acknowledges thereby that Cooke then had no claims or demands whatsoever against the plaintiff, in respect of Cooke's farm at Pudsey, lately occupied under the plaintiff; and in consideration of this undertaking, (that is, of such acknowledgment,) the plaintiff agrees to relinquish all claims against Cooke for mesne profits or holding over. This agreement sufficiently shows the understanding of the parties, that Cooke had agreed to give up his claims on the plaintiff respecting the farm at Pudsey, whatever those claims might be.

It was objected, at the trial, that the agreement of the plaintiff to relinquish all his claims for mesne profits or holding over, did not extend to the trespasses in question. The learned judge, however, thought that the action was substantially brought for mesne profits, and consequently that the agreement did extend to the trespasses in question; in which opinion we agree with him. He further thought that, supposing the plea to be good, it must be construed to import that the claims of Cooke, which he agreed to abandon, were legal, or at least colourably legal claims; in which opinion we also agree; for we think that, upon a general demurrer, the plea would be so construed. But the express ground upon which he directed the jury to find the third issue for the plaintiff was, that no evidence was given that the claims of Cooke were of such a nature as the plea imported. It appears to us, however, that no such proof was necessary upon the issue joined; the existence of

Cooke's claims, as pleaded, being admitted on the record. The allegation contained in the plea, and admitted by the replication, was, that Cooke had claims, that is, legal, or fairly disputable claims, touching a farm occupied under the plaintiff; and the only farm occupied by Cooke under the plaintiff was the farm at Pudsey; and, as it was proved that both parties executed an agreement, by which the plaintiff agreed to relinquish his claims to mesne profits in consideration of the undertaking contained in that agreement, by which Cooke gave up all his claims on the plaintiff respecting his farm at Pudsey, we think that the jury ought not to have been directed to find the third issue for the plaintiff, for want of proof of the nature of Cooke's claim.

The point having been reserved by the judge, the consequence is, the rule for entering a verdict on the third issue must be made absolute, and the rest of the rule discharged.

Judgment accordingly.

HARWOOD, Assignee of CREED, a Bankrupt, against BARTLETT.
—p. 61.

Goods were sold by defendant as agent of C., in contemplation of C's bankruptcy, for the purpose of raising money for defendant and C.: the buyer did not know the sale to be fraudulent: Held, that such sale was not an act of bankruptcy by C.

THIS was an action of trover brought by the assignee of Creed, a bankrupt, to recover from the defendant the value of certain goods sold by the defendant as the agent of Creed. The defendant pleaded, first, not guilty; 2dly, that the plaintiff was not legally possessed as assignee; 3dly, that two months before the *fiat* issued, the defendant, by the authority and as agent of the said bankrupt, sold the said goods, and that he had no notice of any act of bankruptcy committed by Creed.

Issue was joined upon the two first pleas, and the general replication *de injuria*, &c., put in to the last.

The cause was tried before MAULE, B., at the last Spring assizes for Somersetshire. At the trial, the bankruptcy of Creed was admitted; and it was proved that the goods were sold by the defendant as agent of Creed in contemplation of Creed's bankruptcy, for the purpose of raising money for the benefit of the defendant and Creed. The defendant was employed to procure purchasers; the goods remaining in the possession of the bankrupt till delivered to the purchaser. The learned judge told the jury that if any sale was made by the defendant and Creed, with a view to defeat or delay the creditors of Creed, and such sale was fraudulent on the part of the buyer, it was an act of bankruptcy, and that the defendant was liable for that sale, and for all subsequent matters in which he assisted; but that such sale was not an act of bankruptcy, unless the buyer knew the sale to be fraudulent; and that any intention to delay creditors, whether by way of fraudulent preference, or otherwise, would not be sufficient.

The jury negatived the buyer's knowledge of any fraud, and the verdict was entered for the defendant.

A motion for a new trial was made on two grounds; 1st, that the finding of the jury was contrary to the evidence, and 2dly, that the

direction of the judge was incorrect,* in stating that the buyer's knowledge of the fraud was necessary to constitute an act of bankruptcy. But as, upon reference to the learned judge, he expressed himself to be satisfied with the verdict, the rule was granted on the latter ground only.

Bompas, Serjt., who was to have shown cause against the rule, not having received his instructions in time,

Erle and *Butt* were heard in support of the rule. They contended, first, that the circumstances under which Creed had employed the defendant as his agent to sell the goods, was in effect a delivery of the goods to him within the third section of 6 G. 4, c. 16, which makes it an act of bankruptcy if a trader "shall make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels, with intent to defeat or delay his creditors." If it were otherwise, a trader might elude the bankrupt laws and favour any particular creditor, merely by making him an agent for sale, and allowing him to receive the proceeds, instead of selling or transferring goods to him directly.

Secondly, there might be a fraudulent transfer of goods within the meaning of the statute, notwithstanding the buyer of the goods might be ignorant of the fraud. *Cumming v. Baily*, 6 Bingh. 363, (19 E. C. L. R.,) was in point on that head. There, a banker on the eve of stopping payment, sent a bill of exchange for 300*l.*, the property of the firm to which he belonged, to a customer who had paid in that amount to the banker's London correspondent: the customer knew nothing of the failing circumstances of the banker, and was innocent of any fraud; yet this was held an act of bankruptcy. So in *Bevan v. Nunn*, 9 Bingh. 107, (23 E. C. L. R.,) it was held, that under 6 G. 4, c. 16, a transfer of goods in satisfaction of a *bona fide* debt, made voluntarily, and in contemplation of bankruptcy, was an act of bankruptcy, and was not protected by the eighty-first section, though made more than two months before the commission issued. In *Pearson v. Graham*, 6 Adol. & Ell. 899, (33 E. C. L. R.,) the defendant, who was in the employment of the bankrupt, and acting under a general authority, sold goods of his after an act of bankruptcy of which the defendant knew nothing, was held liable in trover to the assignees. *Baxter v. Pritchard*, 1 Adol. & Ell. 456, (28 E. C. L. R.,) *Rose v. Haycock*, 1 Adol. & Ell. 460, note, *Cooke v. Caldecott*, M. & M. 522, (22 E. C. L. R.,) and *Hill v. Farnell*, 9 B. & C. 45, (17 E. C. L. R.,) which were relied on for the defendant at the trial, might be distinguished on the ground that in those cases the defendant was the fair purchaser of the goods, and protected by sect. 82 of 6 G. 4, c. 16. Here the defendant was a conspirator with the bankrupt.

Cur. adv. vult.

TINDAL, C. J., after stating the facts as ante, p. 61. The only question which arises upon this state of facts is, whether, assuming the sale of the bankrupt's goods to have been made by him with the fraudulent purpose of delaying his creditors for his own benefit, or that of the defendant, such sale amounted to an act of bankruptcy, where the purchaser acted *bona fide*, and in ignorance of such purpose and intention of the bankrupt. And we are of opinion, that the direction of the learned judge on this point was correct.

The words descriptive of an act of bankruptcy in 6 G. 4, c. 16, s. 3, are, "shall make or cause to be made, any fraudulent gift, delivery, or

transfer, of any of his goods or chattels, with intent to defeat or delay his creditors." In this case there appears to have been a fraudulent intent, on the part of the seller, to defeat his creditors for the benefit of the defendant; but there was no *gift, delivery, or transfer* of the goods to the defendant; he being only the agent of the seller, by whom the sale to the buyers was effected, for it appears, upon the evidence, that the defendant was merely employed to procure purchasers for the goods, the goods remaining in the possession of the bankrupt himself, or under his control, until they were delivered by his order to the purchasers; and as to the buyers, there was not any transfer or delivery to them which was fraudulent on their part.

Now the precise question whether fraud, on the part of the buyer, was a necessary ingredient in the act of bankruptcy contemplated by the statute, came under the consideration of the Court of King's Bench in the case of *Baxter v. Pritchard*, which Court, after full discussion and time taken to consider, decided that the sale of the whole of a tradesman's stock to a *bona fide* purchaser, who pays a fair price for it, in ignorance of any fraudulent intention of the seller, was no act of bankruptcy. The judgment was pronounced in that case by Lord DENMAN, who had entertained a different opinion at the trial. In delivering that judgment his lordship referred to the case of *Rose v. Haycock*, in which Baron HULLOCK had held, that the mere fact of selling the whole of a trader's property was not, of itself, an act of bankruptcy without proof of fraud; and to *Cooke v. Caldecott*, where Lord TENTERDEN had held, that a sale cannot in reason be held to be a *fraudulent transfer*, unless it takes place under such circumstances, that the buyer, as a man of business and understanding, ought to suspect and believe that the seller means to get money for himself in fraud of his creditors, and that the sale is made for that purpose; he also referred to other cases mentioned in the report above referred to.

Upon the ground, therefore, that there was no delivery at all of any goods to the defendant, and so far as the question turns upon a fraudulent sale, that there was no sale which was fraudulent on the part of the buyers, we think there was no act of bankruptcy proved, and that the rule for a new trial must be

Discharged.

BACKHOUSE and Another; Assignees of BROWN and GRAHAM, Bankrupts, v. JONES and Another.—p. 65.

The fact that, after a *fiat* had been sued out, certain creditors of the bankrupt delivered up to the assignees goods which they had received from the bankrupt before the *fiat*, and before the delivery of certain goods by the bankrupt to defendant, Held, not admissible evidence against defendant in an action of trover brought against him by the assignees.

TROVER. A *fiat* was issued against the bankrupts in March, 1837, upon an act of bankruptcy committed early in that month.

The goods in respect of which this action was brought were delivered to the defendants by the bankrupts in January, 1837; and the plaintiffs brought the action, alleging that there had been acts of bankruptcy previous to that delivery, and that that delivery was in itself an act of bankruptcy.

Among other evidence to establish those propositions, they proved, at the trial before ALDERSON, B., that a few days before the delivery to the defendants, the bankrupts had delivered other goods to other creditors, which goods, or their value, those creditors, after the *fiat* had been issued, returned to the attorney who sued it out.

This evidence was objected to, as amounting to no more than a declaration of the opinion of those creditors; but the objection was overruled, and a verdict was given for the plaintiffs, the jury finding that the delivery of the goods to the defendants was voluntary and in contemplation of bankruptcy.

R. Alexander moved for a new trial, on the ground that the above evidence ought not to have been received; that the verdict was against evidence; and for a misdirection. A rule *nisi* was granted on the first point only.

Cresswell and *Tomlinson*, who showed cause, contended that the restoration of these goods was an act done, and not a declaration of opinion; that it was connected with other acts done by the bankrupts about the time he delivered the goods to the defendants, and was therefore relevant, even as against the defendants, to show the circumstances and the motives of the bankrupts at that time.

R. Alexander and *Cowling*, in support of the rule, argued that the conduct of other creditors could be no part of the *res gestæ* in the delivery to the defendants; that unless the return of the goods were proved to show the opinion of the other creditors, it was an immaterial fact; and as an expression of opinion it was not evidence. *Wright v. Tatham*, 4 New Cases, 489, (33 E. C. L. R.,) *Rex v. Turner*, Moody's Crown Cases, 347. *Cur. adv. vult.*

BOSANQUET, J. This was an action of trover tried before my Brother ALDERSON at Liverpool, at the last Spring assizes, when a verdict was found for the plaintiffs.

Mr. *Alexander* moved for a new trial upon three grounds, first, for the improper reception of evidence; secondly, on the weight of the evidence given at the trial; thirdly, for misdirection of the judge.

The Court refused to grant any rule upon either of the two last points; and the only question now remaining for judgment is, whether certain evidence given by the plaintiffs was improperly received. The plaintiffs sought to recover the goods in question from the defendants upon two grounds: first, that acts of bankruptcy had been committed prior to the time when the goods came into the hands of the defendants, and, secondly, that the delivery of the goods to the defendants was made by way of voluntary preference in contemplation of bankruptcy, which subsequently took place. The plaintiffs endeavoured to prove the prior acts of bankruptcy by showing the delivery of goods to various creditors of the bankrupts; and on this part of their case, they tendered evidence to prove that those creditors, after the *fiat* had issued, returned the goods received by them, or their value, to the attorney under the *fiat*. This evidence was objected to, but received, as tending to show the nature of the transactions between the bankrupts and the creditors, upon which the plaintiffs relied as acts of bankruptcy previous to the delivery of the goods in question to the defendants.

The case was heard before my Brothers COLTMAN and ERSKINE and myself, in the absence of the Lord Chief Justice, and we are of opinion that the acts of the creditors, after the *fiat* had issued, were not receiv-

able in evidence to affect the defendants. The only way in which their conduct bore upon the case, was by showing their conviction that they had received the goods under circumstances which did not entitle them to keep possession. But any declaration of their opinion made by themselves after the *fact*, however clearly expressed, could not have been received in evidence; consequently, evidence of acts done by them, adduced for the purpose of raising an inference respecting the previous intentions, either of themselves or of the bankrupts, must be inadmissible.

The jury found that the delivery of the goods in question to the defendants, was both voluntary and in contemplation of bankruptcy; but if the evidence given upon the other part of the case was improperly received, the verdict cannot stand; for it is impossible to say that it may not have had an effect on the jury in coming to their conclusion respecting the transaction with the defendants.

We think, therefore, that the rule for a new trial must be made absolute.

Rule absolute.

FITZGERALD against WILLIAMS.—p. 68.

In an action against the drawer of a bill of exchange, plaintiff, by way of excuse for not giving notice of dishonour, averred that defendant had no funds in the hands of the acceptor, nor had he sustained any damage for want of notice: Defendant pleaded he had sustained damage, because the acceptor had promised him to provide for the bill: Held, that it was not incumbent on plaintiff to prove that defendant had sustained no damage.

THE declaration stated that the defendant, on the 13th of March, 1837, made his bill of exchange in writing, and directed the same to one T. W. Warre, and thereby required Warre to pay to defendant's order 100*l.*, for value received, two months after the date thereof, which period had elapsed before the commencement of this suit, that the defendant endorsed the bill to the plaintiff, and that Warre did not pay the bill, although the same was presented to him on the day when it became due: and the plaintiff averred that neither at the time when the bill was drawn, nor at any time afterwards and before the bill became due, nor at the time when the same became due and was so presented for payment thereof, had Warre in his hands any effects of the defendant, nor had the defendant ever any reasonable ground for expecting that he had or would have any effects in the hands of Warre, or that Warre would accept the bill, or pay or discharge any part of the amount of the bill, or be provided with funds wherewith Warre ought to pay the bill or any part thereof; nor was there any consideration or value for the acceptance by him of the bill or the payment by him of the amount of the bill or any part thereof; *nor had the defendant sustained any damage by reason of his not having had notice of the non-payment of the bill by Warre*: and thereupon the defendant, in consideration of the premises, afterwards, on the 1st of January, 1838, promised the plaintiff to pay him the amount of the bill on request; yet the defendant had disregarded his promise, and had not paid the amount of the bill, or any part thereof.

Pleas, 1st, that the bill was not presented to the acceptor for payment

when due; 2dly, that by reason of the defendant not having had notice of the non-payment of the bill by Warre, he was damnified in this, that at the time when the bill was made and endorsed, as in the declaration alleged, Warre promised the defendant to provide money for the payment of the bill when the same should become due and payable, and to indemnify and save harmless the defendant from any loss or damage for or by reason of his making the bill; of which the plaintiff then had notice. That at the time when the bill became due and payable, the agreement so made by and between Warre and the defendant was still in full force and effect, and not in any wise altered, rescinded, or annulled. Verification.

The plaintiff joined issue on the first plea, and to the second replied *de injuriâ*.

A verdict having been found for the plaintiff,

Kelly obtained a rule nisi for a new trial, on the ground, among other objections, (a) that the plaintiff had offered no evidence in support of the allegation in the declaration, that the defendant had sustained no damage for want of notice of the dishonour of the bill.

Atcherley, Serjt., who showed cause, contended that this was an immaterial allegation, or if material, that it cast on the defendant the proof of the affirmative that he had sustained damage; but the plea setting up that affirmative was ill, for if the defendant had no effects in the hands of the acceptor, he was not entitled to notice of the dishonour of the bill.

Kelly and *Barstow*, in support of the rule, argued that, inasmuch as when a defendant pleads that no consideration has been given for a bill, which *primâ facie* imports a consideration, it is incumbent on him to make out that proposition, although a negative; a plaintiff, if he takes upon himself to aver that the defendant has sustained no damage from want of notice, which *primâ facie*, must be injurious to him, ought to adduce evidence in support of such an averment. No question could arise in this stage of the proceedings upon the validity of the plea, for the plaintiff had taken issue upon it.

TINDAL, C. J. The plaintiff having averred as an excuse for not giving notice of the dishonour of the bill, that the defendant had no funds in the acceptor's hands, assigned a sufficient excuse if he had stopped short there; for if the defendant had no funds in the hands of the acceptor, he was not damnified; if he was, after the issue he has taken upon the whole allegation, the proof would have come more properly from him. The rule must be discharged.

BOSANQUET, J., and *COLTMAN*, J., concurred.

MAULE, J. The plea puts in issue what is immaterial; and as the defendant did not prove that he had sustained any damage from the want of notice there can be no reason for disturbing the verdict.

Rule discharged.

(a) Upon those objections the Court could pronounce no opinion, the recollections of the counsel as to what passed at the trial being irreconcilable.

LACKINGTON and Others, Assignees of RICHARDSON, a Bankrupt, against COMBES.—p. 71.

To an action by assignees of a bankrupt for the price of a phaeton, for which defendant had agreed to pay ready money, defendant pleaded a set-off in respect of a bill of exchange drawn by H., accepted by the bankrupt, and endorsed by H. to defendant. Plaintiffs replied that after the bill was dishonoured, H. endorsed it to defendant without consideration, in trust the defendant should purchase the phaeton of the bankrupt, hand it over to H., and fraudulently attempt to set off the bill against the price of the phaeton: Held, a sufficient answer to the claim of set-off.

THE declaration stated that before the commencement of this suit, and before Richardson became a bankrupt, to wit, on the 6th of May, 1837, in consideration that Richardson, before he became bankrupt, at the special instance and request of the defendant, would sell and deliver to the defendant a certain vehicle, to wit, a phaeton, and would, before such delivery, make certain additions therein suggested and required by the defendant, the defendant then undertook and faithfully promised Richardson to pay him for the phaeton, such additions having been made as aforesaid, the sum of 48*l.* in cash, on the delivery of the phaeton: and the plaintiffs averred that Richardson, confiding in the said promise and undertaking of the defendant, did afterwards, and before Richardson became bankrupt, and between the day and year above mentioned and a certain other day, to wit, the 13th of May, 1837, make the additions so suggested and required by the defendant, and afterwards, to wit, on, &c., sold and delivered the phaeton, with such additions, to the defendant on the terms aforesaid; and did then, on such delivery, request the defendant to pay Richardson the said sum of 48*l.*; yet the defendant, not regarding his promise and undertaking so by him made, but contriving and intending to deceive and defraud the said Richardson before he became bankrupt, did not nor would, on such delivery, pay the said sum of 48*l.* in cash, or any part thereof, but then wholly neglected and refused so to do; nor did nor would he, at any time thence hitherto, pay the same or any part thereof, either to Richardson before he became bankrupt, or to the plaintiffs as assignees, or any of them, since the bankruptcy of Richardson.

Plea, that before and at the time of the delivery of the phaeton, and from thence until and at the time of the bankruptcy of Richardson, the said Richardson was indebted to the defendant in the sum of 48*l.*, upon and by virtue of a certain bill of exchange in writing, bearing date the 27th of January, 1837; then made and drawn by one John Eives, before the delivery of the phaeton, and before the bankruptcy; [whereby Eives required Richardson to pay to William Harland or order the said sum of 48*l.*, at a certain period which elapsed before the delivery of the phaeton, and before the bankruptcy, to wit, two months after the date

of the bill;] by Elives then, before the said delivery of the phaeton, and before the bankruptcy, delivered to Harland; by Richardson then, before the said delivery of the phaeton, and before the bankruptcy, accepted; and by Harland then, before the delivery of the phaeton, and before the bankruptcy, endorsed to the defendant: which sum of 48*l.*, in the bill specified, from the time of the bankruptcy until and at the time of the commencement of this suit, was due and owing and unsatisfied to the defendant as such endorsee, upon and by virtue of the said bill; and which sum of 48*l.*, so due to the defendant, equalled the full amount of the damages by Richardson before his bankruptcy, and by the plaintiffs as assignees as aforesaid, since the bankruptcy sustained by reason of the non-performance of the promise in the declaration mentioned: that the defendant was ready and willing, and thereby offered to set off and allow to the plaintiffs, as such assignees, the said sum of 48*l.*, so due and owing to the defendant, against the damages, according to the form of the statute, &c. Verification.

The plaintiffs replied, that Richardson, before he became bankrupt, and before any of the times in the declaration mentioned, was indebted to Harland, and in consideration thereof had accepted the said bill of exchange in the second plea mentioned, as therein alleged: that after the bill of exchange had become due and dishonoured, Harland endorsed and delivered the same to the defendant, without any consideration or value whatever for such endorsement or delivery, in order that the defendant might hold the same as trustee thereof for Harland, and on the agreement, terms, and understanding, that the defendant should purchase the phaeton from Richardson on the terms in the declaration mentioned, and afterwards hand over the phaeton to Harland; but instead of such payment for the same as therein alleged to have been agreed upon between Richardson and the defendant, should fraudulently attempt to set off the amount of the bill of exchange against the price of the phaeton: that the defendant was not, at any time in the second plea mentioned, the *bonâ fide* holder or endorsee of the bill of exchange. Verification.

Demurrer,—for that the plaintiffs ought to have directly traversed the allegation contained in the plea that Richardson was indebted to the defendant; and that the replication, if it meant any thing, amounted to an argumentative denial only of that allegation, and was bad for such argumentativeness; that if the replication admitted Richardson to have been indebted as stated in the plea, there was nothing upon the record to deprive the defendant of his right of set-off: that the mere use of the word fraudulently amounted to nothing, unless the facts stated constituted a fraud in law, which they did not, as Richardson voluntarily gave up his lien, which was his only protection against a set-off.

Joinder.

Busby, in support of the demurrer. The plaintiffs, after admitting by their replication that the bill was accepted by Richardson for a *bonâ fide* debt due from him to Harland, are precluded from impeaching the transaction between the defendant and Harland: Bayley on Bills, 499: *Whitaker v. Edmunds*, 1 Adol. & Ell. 638, (28 E. C. L. R. 171; *Fentum v. Pocock*, 5 Taunt. 192, (1 E. C. L. R. 72,) they stand on the right of Richardson; the case must be considered as if the action had been brought by him; and he, as the acceptor, could not inquire into what passed between the endorsee and the holder; *Johnson v. Kennion*, 2

Wils. 262; *Reid v. Furnival*, 1 Cr. & Mee. 538. If so, they are precluded from raising the question of fraud. But assuming that they may impeach the transaction, the facts set forth in the replication do not constitute a fraud for which the defendant should be deprived of his set-off.

The replication is framed with reference to the case of *Fair v. M'Iver*, 16 East, 130, where third persons holding the acceptance of a trader, who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be endorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months,—before which time the traders' acceptance would be due,—but without communicating to the trader that they were the holders of the acceptance: and it was held, that the trader having become bankrupt, and his assignees having brought *assumpsit* to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance, which they did not hold in their own right, but in effect for such other persons. But that case proceeded on the ground that the transaction was a fraud on the other creditors: while *Eland v. Karr*, 1 East, 375, has decided that set-off may be pleaded in answer to an action on an agreement to pay in ready money: so, in *Mayer v. Nias*, 1 Bing. 311, (8 E. C. L. R. 330,) the defendant, who had ordered goods for ready money, paid* for them by returning to the vendor's agent a bill accepted by the vendor, which had been due and dishonoured before the goods were ordered; the agent at first refused to take the bill, but ultimately carried it home to the vendor, who kept it: the vendor having become bankrupt, the Court, in an action brought by his assignees to recover the value of the goods, held that transaction equivalent to payment, no fraud having been established. The same principle prevailed in *Cornforth v. Rivett*, 2 M. & Selw. 510, and *Thorpe v. Thorpe*, 3 B. & Adol. 580, (23 E. C. L. R. 146.) It results from those cases that any contrivance to get a debt paid is a legal contrivance, if it be not a fraud on creditors: the plaintiffs, therefore, should have shown by pleading, what was proved under the general issue in *Fair v. M'Iver*, that the defendant intended this contrivance as a fraud on the creditors, and to elude the bankrupt laws: they should, at least, have averred in the replication, an act of bankruptcy committed by Richardson, and notice thereof to the defendant. In *Hawkins v. Whitten*, 10 B. & C. 217, (21 E. C. L. R. 60,) it was held, in an action brought by the assignees of certain bankers, that a party had a right to set off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that they had committed an act of bankruptcy: and BAYLEY, J., said, "It may be true, and is, that he took these notes for the very purpose of making them the subject of a set-off, and of getting, in substance, 20s. in the pound upon these notes; but, as this has not been prohibited, we cannot say it is illegal." In *Buchanan v. Findlay*, 9 B. & C. 738, (17 E. C. L. R. 486,) the defendants sought to set off a debt due to them from a bankrupt against a demand by his assignees for money which the defendants had fraudulently received on a bill of exchange intrusted to them by the bankrupt; and the Court refused to allow such set-off: but it was held in *Harris v. Lunell*, 4 B. Moore, 10, that the assignees of a bankrupt could not recover against the defendant in trover, in respect of goods

which the defendant had sold to the bankrupt for a bill at two months, and, not being able to obtain the bill, had, in the name of a broker, repurchased at a great loss.

Warren, contra. The cases relied on for the plaintiffs might have applied if the action had been brought against Harland, to whom the amount of the bill was *bonâ fide* due; but, on a claim of set-off under the bankrupt laws, the Court may inquire into all the circumstances which give rise to the claim. In order to establish a set-off, the defendant must show a debt due to him from the bankrupt: 6 G. 4, c. 16, s. 50: here, the debt was due from Richardson to Harland, not to the defendant. *Fair v. M'Iver*, therefore, is in point for the plaintiffs. The principle of that case is confirmed by *Belcher v. Lloyd*, 10 Bingh. 310, (25 E. C. L. R. 145,) and *Key v. Flint*, 8 Taunt. 21, (4 E. C. L. R. 1,) which sufficiently establish the difference between a claim by action and a claim in the way of set-off.

Then, upon the replication it is clearly shown that this transaction was a fraud, and intended as a fraud, upon the creditors of Richardson. It is averred that the bill was endorsed and delivered to the defendant after it had been dishonoured; that no consideration was given for it; that the object of the transfer was to make the defendant a trustee for Harland, to purchase the phaeton, and instead of paying for it in ready money, to set off the acceptance, and so obtain 20s. in the pound upon the amount.

Busby, in reply, relied on *Eland v. Karr* and *Cornforth v. Rivett* to show that this was no fraud, but a legitimate contrivance to obtain the payment of a debt; and that, if it were a fraud with respect to the creditors of a bankrupt, the plaintiffs ought to have replied the existence of the act of bankruptcy and the defendant's knowledge of it, in order that he might have had the opportunity of traversing those allegations.

Cur. adv. vult.

TINDAL, C. J. The question raised upon this record for our consideration is, whether the facts stated in the replication are sufficient to show that the defendant is not entitled to avail himself of the right to set off the acceptance of the bankrupt insisted upon by his plea. And we are of opinion, that the facts stated in the replication show that the case does not fall within the fiftieth section of the bankrupt act, and that the set-off ought not to be allowed.

It may be true, as urged in the argument on the part of the defendant, that Richardson, the bankrupt, being the acceptor of the bill for a valuable consideration, would not have been able, if he remained solvent, to set up the want of consideration for the endorsement of the bill by Harland, the payee, either in answer to an action on the bill by Combes, the holder, or in reply to a plea of set-off. But the question in this case turns upon the clause in the bankrupt act which gives the right of set-off; and we think, under the facts stated in the replication, there was no debt whatever between the bankrupt and the defendant arising out of the acceptance, within the meaning of that clause; but that the whole transaction, as between Combes and Harland, was a mere colour and contrivance to make it appear that the defendant was the real and *bonâ fide* holder of the bill at the time of the bankruptcy; whereas in truth he had no interest whatever in it, but held it only as agent of Harland, for the purpose of enabling the latter to receive 20s. in the pound upon the bill instead of coming in for a dividend under the

commission. For the replication alleges, that the bill of exchange was endorsed to and put into the hands of the defendant after it was due and dishonoured, without any consideration whatever; and that the purpose and design of such endorsement and delivery to the defendant, was, that he might hold it as trustee for Harland, on the understanding that the defendant should purchase the phaeton from Richardson, and afterwards hand it over to Harland, but instead of paying for it in money, as agreed on by the contract, should attempt to set off the amount of the acceptance. Every step in the transaction, therefore, proceeded on fallacy and falsehood; it was an unreal transaction from beginning to end; and could never create a debt as against the creditors within the meaning of the statute, which must have intended a real *bonâ fide* debt. The present case appears to be stronger against the defendant than that of *Fair v. M'Iver*, inasmuch as it was not shown in that case that M'Iver had taken the bankrupt's acceptance by any preconcert with the endorsers that he should purchase for their benefit and set off the bill against the demand; but for any thing that appears to the contrary, the plan of setting off the bill was concocted between the defendant and the endorsers after the bill came into his hands. We think, therefore, the present case falls clearly within the principle laid down in *Fair v. M'Iver*, and must be governed by it; that there was no real *bonâ fide* debt due to the defendant capable of being set-off under the statute; and consequently the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

DOE dem. MARCHANT against ERRINGTON.—p. 79.

S. being possessed of chambers in Lincoln's Inn, to which he had been admitted by the benchers who were the owners of the fee simple, by a deed, reciting that he was seised of them for life, conveyed them to plaintiff, to hold during the life of S. S. continued in possession, and afterwards surrendered the chambers to defendant, who was admitted by the benchers: Held, that defendant was not estopped to deny that S. was seised for life.

THIS was an action of ejectment to recover possession of a set of chambers in the Old Square, Lincoln's Inn. The cause came on to be tried before TINDAL, C. J., at the sittings in Middlesex, after Michaelmas term last, when a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case:

On the 29th of July, 1833, Simeon John Boileau being in possession and occupation of a set of chambers in the Old Square, Lincoln's Inn, of which he claimed to be seised of an estate for his own life, by a certain deed or indenture bearing date the day and year aforesaid, and made between the said S. J. Boileau of the first part, one Thomas Flight of the second part, and Jonathan Marchant of the third part,—after reciting therein that S. J. Boileau was seised or well entitled for an estate for his own life in or to the said chambers or appurtenances and hereditaments,—granted to Flight an annuity of 99 years, if Boileau should so long live, charged upon the said chambers; which in the indenture were described to be in the possession or occupation of Boileau, and to which he was admitted by the Honourable Society of Lincoln's Inn, for his own life, on the 11th of May, 1832, according to an order made at a council held the same day; and for the considerations mentioned in the indenture, by the direction of Flight, granted.

bargained, and sold, released, and confirmed, to Jonathan Marchant, the said chambers, to have and to hold the same during the natural life of the said S. J. Boileau, and for all the estate, term, and interest of him the said S. J. Boileau therein; but upon the trusts therein mentioned concerning the same, which were in fact to secure the said annuity and charge. The annuity deed was duly registered, and a memorial thereof duly enrolled in the Court of Chancery.

Afterwards, in Michaelmas term, 1836, the defendant, on being applied to at the chambers, stated that he had purchased the property of Boileau, who gave up possession of the chambers to the defendant in manner hereinafter mentioned, when the defendant took possession of the same.

The annuity was in arrear when the action of ejectment was commenced.

The chambers in question are part and parcel of Lincoln's Inn, and the fee simple of them, on the day of the demise in the declaration, was vested in the benchers of Lincoln's Inn in trust for the said society. According to the regulations of the society, persons admitted to the chambers in the Inn, must be members of the Inn before they are admitted, and the only course of admission to chambers is as follows:—The person last admitted presents a petition to the masters of the bench for the time being for permission to surrender his chambers,—first paying all his arrears of dues and duties,—and that the person who is to succeed him may be admitted thereto for his own life; the party who is to succeed also presents a petition to the said masters to be so admitted; and thereupon, if they consent to the petitions, an order is made that the person then admitted may have leave to surrender, and that the person who is to succeed may be admitted on paying the fines and fees. It is in the discretion of the masters for the time being to make such orders respecting the admission to or exclusion from chambers in the Inn, as they may think fit. When new admissions are granted, the old admissions are not delivered up or inquired for. A copy of the order of the masters is given to the party admitted, setting forth that he has paid his alienation fine. The conveyances of the fee to new trustees are prepared according to an order of the masters, and are executed at uncertain periods, and when the deaths of many of the last trustees render the appointment of new trustees expedient.

In Easter term, 1832, Francis Burnside, a barrister, and member of Lincoln's Inn, was the person admitted to the chambers in question; in that term he and Boileau, who was also such barrister and member, presented petitions to the masters of the bench; and on the 11th of May in that year, an order was made for the admission of Boileau. In Michaelmas term, 1833, Boileau and the defendant, being respectively barristers and members of Lincoln's Inn, presented their petitions to the masters of the bench, and on the 25th of November, 1833, the order was made for the admission of the defendant.

The defendant paid his alienation fine; and a copy of the benchers' order was delivered to him, which stated that he had paid the fine.

The defendant entered upon the chambers, and has held them ever since.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in the ejectment, and if so, the verdict for the plaintiff was to stand; otherwise a nonsuit was to be entered.

Hoggins, for the lessor of the plaintiff. It may be admitted that the legal estate in these chambers is in the benchers of Lincoln's Inn, as trustees for the society; but, as against the defendant, the lessor of the plaintiff is entitled to recover by estoppel: the defendant, who received possession from Boileau, claims under him; and is in respect of title in the same situation as Boileau. But Boileau having, by the deed of July, 1833, recited that he was seised for life, and having conveyed to Marchant an interest during his life, is estopped to deny that he had such an estate, even though in fact he had nothing; *Trevivan v. Lawrence*, 1 Salk. 276. [TINDAL, C. J. The defendant does not claim under any interest in Boileau, but under the society of Lincoln's Inn.] The defendant is in by virtue of Boileau's surrender to the society. It is laid down in Co. Lit. 59 b, that "the lord is but an instrument to admit the *cestui que use*, for no more passeth to the lord but to serve the limitation of the use, and the *cestui que use*, when he is admitted, shall be in by him that made the surrender, and not by the lord." [TINDAL, C. J. The fallacy is in the assumption that Boileau passes any thing by the surrender: that may be so in the case of copyholds, but in other cases a surrender passes no estate from the surrenderor but such as is in him.] Still, if the surrender passed nothing, an estoppel may arise out of an act in *pais*; Com. Dig. *Estoppel*; and the defendant is concluded by the payment of money to Boileau. In *Right v. Bucknell*, 2 B. & Adol. 281, (22 E. C. L. R. 73,) Lord TENTERDEN referred to an estoppel in the same form as the present in a case of *Bensley v. Burdon*, 2 Sim. & Stu. 519; 5 Russell's Ch. Rep., as being conclusive against the party upon an allegation of a particular fact.

TINDAL, C. J. The case has properly been argued on the ground of an estoppel; for if it were a question of title the plaintiff has no claim. If Boileau took, under the trustees of the society of Lincoln's Inn, an estate at will, though in equity he might expect that it should continue for life, that expectation was determined by his own act when he surrendered to the society. The plaintiff, therefore, can only claim under the estoppel created by the deed of July, 1833. Now an estoppel applies only to privies in estate: it is laid down in Co. Lit. 352 a, "First, that every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel;" and the defendant neither claims through, nor after, nor from Boileau; an act, indeed, was to be done by Boileau, but the defendant's estate does not come from him, but from the trustees of Lincoln's Inn. The case comes nearer to that put by Sir W. Jones in *Edwards v. Rogers*, Sir W. Jones, 460, where he says, "If a father disseise his son, and levy a fine, this fine will not bind the son as heir and privy, for he does not claim from his father; or if a father be tenant for life, remainder to his son in fee, and levy a fine, this will not bind the son as privy, for his reversion; or if the father levy a fine of the lands of the mother, the son is not bound.

BOSANQUET, J. I am of the same opinion, on the short ground that the defendant does not claim any estate from Boileau.

COLTMAN, J. I am of opinion that the defendant did not take under Boileau; and even in the payment he made there was a recognition of the title of the society, so that there is no estoppel between him and Boileau.

MAULE, J. There may be a question as to the estoppel between

Boileau and Marchant, but it is quite clear that the defendant is not bound by it.

Judgment for defendant.

DEVAUX and Another against STEINKELLER.—p. 84.

A representation made by defendant as to the credit of a firm in which he was partner, Held to be a representation as to the credit "of another person," within the meaning of 9 G. 4, c. 14, s. 6.

THE declaration stated that the plaintiffs before, and at the time of the committing of the grievance by the defendant hereinafter mentioned, carried on the trade and business of merchants, to wit, at London; and the defendant and one Darlincourt and one Ladame, also then carried on the trade and business of merchants at Paris, under the firm, style, and description of Darlincourt and Ladame: that the plaintiffs and the said firm had also previously been from time to time used and accustomed to have certain dealings with each other in the way of their said trade as such merchants, and the plaintiffs had also been previously accustomed from time to time to give credit to the said firm in account: that the plaintiffs at the time of the committing of the grievance next mentioned, had become and were suspicious of the credit and circumstances of the said firm, and also had then become and were unwilling to have further dealings with them, or to trust the said firm and give them further credit; and would not so have done but for the false and deceitful representations of the defendant; of which the defendant at the time of committing the grievance had notice: and thereupon the defendant so being a partner in the said firm of Darlincourt and Ladame on the 1st of August, 1836, contriving and intending to deceive and defraud the plaintiffs, and wrongfully, deceitfully, and fraudulently to induce, persuade, and encourage the plaintiffs to deal with the said firm in the way of their trade and business, and to sell and deliver to the said firm divers goods, wares, and merchandises on trust and credit, falsely, fraudulently, and deceitfully then asserted and represented to the plaintiffs that the said firm was trustworthy: by means of which false, fraudulent, and deceitful assertion and representation the defendant did then and there fraudulently and deceitfully induce, persuade, and encourage the plaintiffs to deal with and to trust and to give credit to them in that behalf, and to sell and deliver to them divers goods, wares, and merchandises upon trust and credit: that the plaintiffs, confiding in and giving credit to the said assertion and representation of the defendant, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on, &c., deal with the said firm in the way of their trade and business, and did trust and give credit to them in that behalf, and did sell and deliver to them divers goods, wares and merchandises to a large amount, to wit, to the amount of 3000*l.* upon trust and credit; and did also, during the period last aforesaid, make certain payments for and on account and for the use of the said firm, at their request, to a certain other large amount, to wit, the amount of 500*l.*: whereas, in truth and in fact, at the time of the defendant making his said assertion and representation, the plaintiffs could not safely trust and give credit to the said firm, nor could the plaintiffs safely

sell and deliver to them any goods, wares, and merchandises upon trust and credit, nor were they then trustworthy; and the defendant, when he made his said last-mentioned assertion and representation, well knew the same. That the said firm had not, nor had any other person on the behalf of the said firm, paid to the plaintiffs the said several sums of money so due to the plaintiffs for the goods, wares, and merchandises, and for money so by them paid as aforesaid, or any part thereof, but on the contrary thereof the said firm was, and still is, wholly unable to pay the same, or any part thereof, to the plaintiffs; and the same was wholly lost to the plaintiffs.

There was a second count in *trover*.

Plea. That the alleged grievance in the declaration mentioned was a representation alleged to have been made by the defendant to the plaintiffs concerning the credit and ability of certain persons trading under the firm of Darlincourt and Ladame, to the intent that the said firm might obtain credit from the plaintiffs thereupon, and that such representation was not made in writing signed by the defendant according to the form of the statute in such case made and provided. Verification.

Demurrer and joinder.

Barstow, in support of the demurrer. The plaintiffs are entitled to sue, there having been fraud on the part of the defendant, and damage resulting from it to the plaintiffs. Com. Dig., *Action on the Case for Deceit*, A. 1. *Pasley v. Freeman*, 3 T. R. 51; *Haycraft v. Creasy*, 2 East, 92; *Dobell v. Stevens*, 3 B. & C. 623, (10 E. C. L. R. 201.) If so, the plea is ill. The statute 9 G. 4, c. 14, s. 6, enacts, "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, &c. of any other person, unless such representation be made in writing," &c. Here the representation was as to the character and credit of a firm of which the defendant was a member; it was therefore, in effect, a representation of his own character and credit, and not of the character and credit of another. Besides, the Statute of Frauds must be looked to as a key to interpret the meaning of 9 G. 4, c. 14; *per PARKE, B.*, in *Lyde v. Barnard*, 1 Mees. & W. 115; the latter statute does not require that a representation shall be reduced to writing, unless it relate to a contract which ought to be in writing under the Statute of Frauds; and the fourth section of that statute would not require that a contract by the defendant on behalf of himself and partners should be reduced to writing, in order to give it validity.

Petersdorff, contra. Either the declaration is ill, or the plea good. If the defendant's representation applies to his own solvency, the plaintiff ought to have declared on it as a warranty; for, unless they amount to a warranty, representations made by a vendor create no liability: *Chandelor v. Lopus*, Cro. Jac. 4; *Roswell v. Vaughan*, Id. 196; *Bayly v. Merrel*, Cro. Jac. 386: if it applies to the credit of others, it ought to have been in writing. But if this action be maintainable, a plaintiff may, in all cases, harass his debtor with two actions in respect of the same demand; one for the price of the goods; the other for the purchaser's misrepresentation of his own solvency. Those actions might be pending at the same time, though the jury would have no means of ascertaining what damages they should give in either till the result of the other was known. Parties cannot vary their rights by substituting one form of action for another: *Jennings v. Rundall*, 8 T. R. 335.

Burston, in reply. The difficulty of estimating the damages would not prove that the action does not lie: that difficulty often exists in the case of an action against a sheriff for an escape.

TINDAL, C. J. It is unnecessary to advert to the objection which has been raised to the declaration; and I give no opinion on the point whether or not such an action is maintainable; because it seems to me clear that this plea is an answer to the present action. The stress of the argument for the plaintiff is, that the sixth section of 9 G. 4, c. 14, is confined to cases where the contract is required by the Statute of Frauds to be in writing; and it is then urged that, as the defendant might have bound himself and partners without any written contract, he may be responsible for his representation, though not made in writing. I think, however, that the sixth section is not confined to cases under the Statute of Frauds, which is not mentioned in the act till afterwards. The sixth section says, "No action shall be brought whereby to charge any person upon or by reason of any representation, or assurance made or given concerning or relating to the character, conduct, credit, &c., of any other person, unless such representation be made in writing," &c. It appears by the declaration that the representation, here, was made by the defendant alone; that he was in partnership with two others; and that the representation was that the *firm* was trustworthy; not that he alone was, but that he and others were. If the representation had been confined to the two others, there can be no doubt it would have been within the statute; and it is not the less a representation of the solvency of the two because he adds himself. I think, therefore, that this was a representation as to persons who are not parties to this action; and that it was a representation as to the credit of others, within the meaning of the statute.

Our judgment must be for the defendant.

BOSANQUET, J. I was struck at first, with the observation that the object of the statute was to give further effect to the Statute of Frauds, and expected to have found a recital of that statute in the sixth section; but it is not till after that section that any mention of the Statute of Frauds occurs; and I think the present case falls within the words and spirit of the sixth section. The declaration states that the defendant represented the *firm* as trustworthy. It is true, that he, being a partner, the goods obtained upon the faith of the representation were delivered to him as well as to his partners; but it would be extraordinary if the statute should be defeated with respect to representations as to the credit of a firm, because the party making them happens to be one of the partners. I think that such a representation is a representation as to the credit of others, within the meaning of the statute.

COLTMAN, J. I am of the same opinion. I think this falls within the words and the spirit of the act, and I am not disposed to fritter away the effect of so beneficial an enactment. The representation was, no doubt, a representation as to the credit of the defendant; but it was also a representation as to others, to the intent that they might obtain credit for goods purchased.

MAULE, J., having been of counsel in the cause, gave no opinion.

Judgment for the defendant.

PISANI against LAWSON.—p. 90.

An alien friend, though resident abroad, is entitled to sue in the Courts at Westminster, for a libel published concerning him in England.

THE declaration stated that, before the time of the committing the grievances by the defendant hereinafter mentioned, to wit, on the 1st of January, 1837, and from thence continually until and at the time of the committing the said grievances by the defendant, our sovereign lord, King William the Fourth was, and our sovereign lady the queen still is, on terms of peace and amity with the Ottoman Porte; that during all the time last aforesaid, the Right Honourable John Brabazon, Lord Ponsonby, was, and still is, ambassador from our said late lord the king to the said Ottoman Porte, the said Ottoman Porte being, during all the time aforesaid, a foreign power on terms of peace and amity with his late majesty; that the said Lord Ponsonby, during all the time aforesaid, was, and still is, the chief of the English embassy at Constantinople; that there were, during all the time aforesaid, and still are, certain persons, called dragomans, or interpreters, of which said dragomans, or interpreters, a certain limited number, to wit, five, were, during all the time aforesaid, and still are, employed by the British government in the service of the said Lord Ponsonby, being such ambassador as aforesaid, as dragomans or interpreters to and of him the said Lord Ponsonby, as such ambassador as aforesaid, and to and of the said British embassy at Constantinople, for certain reward to them the said last mentioned dragomans or interpreters respectively in that behalf; that the plaintiff, during all the time aforesaid, was, and still is, one of the said last mentioned five dragomans or interpreters; that the employment of the said plaintiff as one of the said five dragomans or interpreters is, and during all the time aforesaid was, an office of considerable trust and responsibility and could not nor can be properly executed without skill and fidelity on the part of the person holding it; and is also, and during all the time aforesaid was, a situation of considerable value, profit, and emolument; that the plaintiff, during all the time aforesaid, behaved with skill and fidelity in the execution of his said employment, and had never shown any incapacity, or been guilty of any dishonesty in his conduct or behaviour therein: yet the said defendant, well knowing the premises, printed and published, and caused and procured to be printed and published, of and concerning the said plaintiff, as one of the said five dragomans or interpreters, and of and concerning the said five dragomans or interpreters, of whom the said plaintiff was and is one as aforesaid, and of and concerning the behaviour and conduct of the said plaintiff and the said other dragomans or interpreters, a certain false, scandalous, malicious, and defamatory libel;—(the declaration, after setting out the libel, concluded,)—by means of the committing of which said grievances by the defendant as aforesaid, the plaintiff was greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace, insomuch that divers persons, by reason of the committing the grievances by the defendant as aforesaid, suspected and believed, and still do suspect and believe the said plaintiff to have shown incapacity, and to have been guilty of dishonesty in his said employment, and by reason of the committing the grievances

by the defendant as aforesaid, from thence hitherto, wholly refused, and still do refuse, to have any transactions, acquaintance, or discourse with the said plaintiff, as they would otherwise have had; and the said plaintiff, by reason of the committing of the grievances by the defendant as aforesaid, had been greatly injured in his said employment, and had been and was otherwise greatly injured.

Plea, that the plaintiff, before and at the time of the committing of the said supposed grievances in the said declaration mentioned, was, and still is, an alien born, that is to say, at Constantinople, in the dominions of the Ottoman Porte, and there was, and still is, resident and living out of this kingdom, and within the dominions of the Ottoman Porte, at parts beyond the seas, to wit, at Constantinople aforesaid; that the plaintiff had never been domiciled, or naturalized, or made a denizen within the dominions of our sovereign lady the queen, or been in obedience or subject to the laws or customs of the United Kingdom of Great Britain and Ireland, or of any of the countries or territories comprised within the last mentioned dominions; that the plaintiff had never used or exercised, and did not now use or exercise trade as a merchant into or from any part of the said kingdom or of the said countries and territories; and that the plaintiff was not now in the allegiance of our lady the queen, or in any manner subject to her laws. Verification.

Demurrer,—for that the alienage of the plaintiff, stated in the said plea, did not, nor did any of the matters stated in the plea, show any incapacity or disability in the plaintiff to maintain this action: that the plea was a dilatory plea, and contained matter only pleadable in abatement, but was, nevertheless, pleaded in bar of the action; that the plea did not show or aver that the plaintiff was not in England when he commenced this action; that the plea was double, and bad for duplicity; and was in other respects uncertain, informal, and insufficient.

Joinder.

J. W. Smith, in support of the demurrer, argued that this action lay for an alien friend. Bro. Abr. *Nonabilitie*, pl. 62; *Denizen and Alien*, pl. 10; Vin. Abr. *Alien A.* It was laid down in *Dyer*, 2 b, that an action of debt lay for an alien friend resident in France; and in Com. Dig. *Alien*, C. 5, an action of slander, *R. v. Peltier*, Selw. N. P. 1041, was decided on the same principle, which is, that it would excite hostile feelings and prove a great public detriment, if foreigners could be libelled or slandered with impunity by any persons in this country. No inconvenience could ensue to the defendant, for, if necessary, the Court would call on the plaintiff to give security for costs, as the Court of Queen's Bench had recently done in the case of Otho, king of Greece. At all events the alienage ought to have been pleaded in abatement. [The Court having pronounced no opinion on this point, the argument is omitted.]

Platt, contra, admitted that protection was afforded in England to merchant strangers: Magna Charta, cap. 30; 2 Inst. 57; 11 Ed. 1; Statute de Mercatoribus; 13 Ed. 1. But that was only a case of exception, for the general rule, as established by *Calvin's Case*, 7 Rep. 1, and *Wells v. Williams*, 1 Salk. 46, was that ligeance and protection were correlative: the plaintiff was not within the ligeance, and, therefore, not entitled to the protection of the Courts belonging to the sovereign of this country. The action of debt in *Dyer*, 2 b, was probably

brought by a merchant; and though Comyns laid it down generally, that an action of slander lay for an alien friend, the authority he referred to, was *Tirlot v. Morris*, 1 Bulstr. 134, Yelv. 198, where the plaintiff was a merchant, and it did not appear whether he was a resident in England or elsewhere, at the time of the action. *R. v. Pellier*, was a criminal information for a libel on a foreign potentate, which might have involved the nation in the calamity of war, and, therefore, did not apply to the case of a private individual. *R. v. Lord George Gordon*, 1 Russ on Crimes, 233, and *R. v. Vint*, Ibid., proceeded on the same principle. If the present action lay for ordinary persons, foreigners might combine to put down fair discussion in this country. [TINDAL, C. J. That cannot be, because fair discussion is no libel.] At all events the plaintiff ought to show ligeance, either as a natural born subject, as a denizen, or as a resident in this country. [TINDAL, C. J. Suppose an action brought in this Court by a Frenchman at Paris, for money advanced by him to an Englishman.] The money being bona he might have a right to recover it in our Courts. [TINDAL, C. J. Suppose an Englishman beats a Frenchman at Boulogne, and then comes to England, would not the Frenchman have a right to sue for the assault in our Courts?] That question may be answered by supposing the case of a slave, imprisoned in the United States of America; could he sue for redress in the Courts of this country? [TINDAL, C. J. Here, the injury is inflicted by a person resident in this country, and the plaintiff by suing him in our Courts, sues according to the laws of this country.] In Vin. Abr. *Alien*, H, it is laid down that *alien n e* is no plea, *because merchants* might bargain to sell their merchandise, and the bargain would be good. The right to sue, therefore, must be confined to such aliens as are merchants.

TINDAL, C. J. I am of opinion that the present action is maintainable, although brought by an alien not residing within the queen's dominions. With respect to real actions, it has always been held that no alien can sustain one, because he is disqualified by the law to hold land. But this is a personal action, for an injury done within this realm; and so long ago as the 19th of Henry 8, I read in a case reported in Dyer, page 2, that an alien living in France having brought a writ of debt, and the defendant having demanded judgment if he was bound to answer, the plaintiff being out of the king's dominions, this Court held that the plea furnished no answer to the action. Now, that case, in the generality of its terms, comprehends the present. Then, there is *Tirlot v. Morris*, the case in Bulstrode, relied on for the defendant, where an alien brought an action for scandalous words, namely, for saying of him that he was a bankrupt: it was answered, that the plaintiff was an alien born, he being a stranger merchant, and residing out of the kingdom: Mr. Justice WILLIAMS thought the action would not lie; but the other three judges of the Court held that it did; and that an alien friend might well maintain all actions personal, such as assault and battery, &c. So that the Court did not take the distinction now supposed between an action for defamation, and an action in respect of goods, or brought by the plaintiff in the character of a merchant. It would present our laws in a very unfavourable light to strangers, if they were to be told that they can obtain no redress for an injury inflicted on them in this country, whereas if they come here, but for an instant,

they owe such obedience to those laws as to become liable for any wrong done by themselves.

BOSANQUET, J. I am of the same opinion. It is said by this plea, that the plaintiff is under a personal disability; that he is an alien, and has never been in this country, and that therefore he can maintain no action here, protection and allegiance being reciprocal. Now it is clear, from the cases cited, that this proposition is not universally true; because it has been decided in one case, that an alien may maintain an action for slander, although not living in the king's dominions; and, in another, (read by the chief justice,) that a native of France—whether he was a merchant or not, does not appear—might maintain an action of debt, though he resided in France. It is admitted, that if he had come to this country he would be entitled to protection. Now, if merely coming here for one hour, an alien would be entitled to maintain such an action, it would be strange, indeed, if the present plaintiff could not maintain it: for what does the declaration state? That the plaintiff was in the confidential employ of Lord Ponsonby and the British government, at the time; and that the libel is published of him in that character. If the courts in this country will not protect a party in this situation, I know no case in which any person not a natural born subject of this realm can expect protection.

COLTMAN, J. I consider that it would be disgraceful to the laws of this country if the plaintiff could not maintain this action. As it stands on the record at present, the plaintiff is libelled by a person in this country; and it is said that, because he is an alien, he can maintain no action for it. The burden is cast upon the defendant, to show why he is exempted from the ordinary rule. But no authority has been cited, nor any reason offered, except that the plaintiff is an alien. That is not sufficient, for it would apply equally in the case of the alien merchant, which shows that no such ground of defence is valid; and this is not the time when I should feel disposed to narrow the free intercourse which ought to exist between friendly nations.

MAULE, J. I concur with the rest of the Court. It is not true that an action does not lie, except for one in the queen's ligeance; actions of trover have constantly been brought by foreigners. No authority has been cited to show that such an action cannot be sustained; but even if, in general, an alien could not sue, there is good reason why the present plaintiff should be entitled to do so, filling the office which he does in the employment of the British government.

Judgment for the plaintiff.

**GOLDSTONE and JAY, Executors of ANN TOVEY, against
THOMAS TOVEY.—p. 98.**

In an action against defendant as acceptor of a bill of exchange, no evidence being given in whose hand the acceptance was written. Held, that the circumstance of the bill having been paid by the drawer, and the amount of it obtained on discount by defendant's wife having been applied by her in discharge of his debts, was not sufficient to prove that he had sanctioned the acceptance.

THIS was an action against the defendant as acceptor of a bill of exchange for 100*l.*, drawn in November, 1836, by Ann Tovey, the

testatrix, payable three months after date; and for 400*l.*, paid by the plaintiffs as executors of Ann Tovey, to the defendant's use.

Plea, as to the bill of exchange, that the defendant did not accept, and, as to the rest of the demand, *non assumpsit*.

The bill was paid by Ann Tovey, in February, 1837, and the 400*l.* by the plaintiffs, as her executors, after her decease, in July in the same year, being the amount of a promissory note for 100*l.*, made in February, 1837; another for 200*l.*, made on the 6th of April, 1837; and another for 100*l.*, made on the 19th of April in the same year; which instruments purported to be the joint and several notes of the defendant and Ann Tovey.

The question between the parties was, whether the amount paid on the bill and promissory notes was a gift from Ann Tovey to the defendant, or advanced to him as a loan.

At the trial before TINDAL, C. J., no proof was given by whom the defendant's name was written on the bill of exchange. But the plaintiffs showed

That the defendant's name was subscribed to the promissory notes by his wife: that he was an innkeeper; that his wife chiefly conducted the business of the inn; and that she had given the bill of exchange and the notes to creditors, in discharge of debts incurred in carrying on the concern.

It was proved on the other side, that Ann Tovey was step-mother to the defendant, who, in 1836 and 1837, was in embarrassed circumstances. When she drew the bill, in November, 1836, she told a banker, who discounted it, that it was drawn on her own account, to assist the defendant; and when she put her name to the notes of February and April, 1837, she signed letters written by the defendant's wife in her name to the creditors to whom the notes were paid, stating that the amount of them was a gift from her to the defendant; towards whom, it appeared, she had, on several occasions, expressed her good will.

About the end of April, 1837, she was seized with a paralytic stroke, when the plaintiffs—her apothecary and attorney—took possession of her, and excluded the defendant and his family from her house for nearly three months, till she was in the act of death, and senseless.

The chief justice told the jury he considered the evidence insufficient to warrant a verdict for the plaintiffs as to the count on the bill of exchange, there being no proof that the defendant had authorized his wife to affix, or to cause any other person to affix, his acceptance to a bill of exchange, nor even who the person was that had affixed it to the present bill; but that with respect to the 400*l.* paid by the plaintiffs to the defendant's use, the question was, whether Ann Tovey made the promissory notes as a gift to the defendant, or as a loan.

A verdict was found for the defendant, which

Bompas, Serjt., obtained a rule *nisi* to set aside, as being against the evidence, and on the ground that the chief justice had withdrawn from the jury the question whether or not the defendant had authorized the acceptance of the bill of exchange, or, at all events, had misdirected them on that point.

Erle and *Bingham*, who showed cause, asserted that the question as to the bill of exchange had not been withdrawn from the jury, but left to them with a strong direction to find a verdict for the defendant, which the circumstances of the case fully warranted.

Bompas, in support of the rule, argued, that the circumstance of the money arising from the bill having been paid in discharge of the defendant's debts, without repudiation on his part, accompanied with the fact that the amount of the three promissory notes signed by his wife in his name had also been so applied, raised an irresistible inference that he had sanctioned, and therefore was responsible for, the acceptance of the bill of exchange, by whomsoever it was signed; and such should have been the direction to the jury; whereas the question had, in effect, been withdrawn from their consideration. The very defence set up, that the bill was a gift, implied that the defendant had adopted the acceptance.

TINDAL, C. J. Upon referring to my notes, I do not find that the consideration of the first issue was withdrawn from the jury by me, but rather left to them with a strong impression on my part, that it ought not to be found for the plaintiffs. And I am still of the same opinion. I do not think there was any evidence to show that the defendant's wife was authorized to accept, or cause the bill to be accepted, or that the defendant had sanctioned the acceptance: her signing in his name three months afterwards, notes, the amount of which was paid to his creditors, and the payment of the bill by Ann Tovey, is no proof that the defendant authorized the acceptance three months before.

On the other ground there is no reason for disturbing the verdict, and the rule must be discharged.

BOSANQUET, J. I am of the same opinion: there is no proof here that the acceptance was written, either by the defendant or by his wife; and it is clear that the wife could not be allowed to accept, except under an express authority. In *Murray v. The East India Company*, 5 B. & Ald. 204, (7 E. C. L. R. 66,) it was held, that a power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all moneys, debts, dues, whatsoever, and to give sufficient discharges, did not authorize him to endorse bills for his principal.

Here the question is, whether the wife *permitted* any one to accept with the husband's authority; and of that there is no evidence. Reliance has been placed on the circumstance of her signing the promissory notes which were afterwards applied in discharge of the defendant's debts; but they were not signed till three months after the bill of exchange.

COLTMAN, J. I see no evidence of any authority to accept. The circumstance that the amount of the bill was applied in discharge of the husband's debts is not of itself sufficient; there ought to be distinct proof of authority to accept.

MAULE, J. There is no evidence on which the jury could find the issue as to the acceptance in favour of the plaintiff. The wife conducted the defendant's business, but that would not authorize her to accept bills. Then, some months after the bill had been drawn, she put his name to three promissory notes; there is no evidence, however, that she had authority to do so, and it is not sufficient to show merely that the money was applied in discharge of the husband's debts.

Rule discharged.

BELCHER and Others, Assignees of THOMAS DRIVER, a Bankrupt, against OLDFIELD.—p. 102.

D. being captain of a ship bound to the East Indies, and proprietor of the cabin furniture, deserted the ship at Algoa Bay, when the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship. On the 18th of October, while the ship was on her voyage home, D., being indebted to the owner, gave him a written order as follows:—"I hereby authorize you to keep possession of my cabin furniture when the ship arrives, and to place the value of the same to the credit of my account with you." The ship arrived on the 5th of December, and a *fiat* in bankruptcy was issued against D. on the 18th, on an act of bankruptcy committed on the 2d. Held, that D.'s assignees could not recover against the owner *in trover* for the cabin furniture.

TROVER. Verdict for the plaintiffs, subject to the opinion of the Court upon the following case:—

The plaintiffs were assignees of the estate and effects of Thomas Driver, who was captain or master of the ship Bolton, in the East India trade; the defendant was the owner thereof.

The action was brought to recover the value of certain stores and furniture put on board in London, for the use of the bankrupt and his passengers on the voyage from London to Calcutta, and which were the cabin furniture and other property referred to in the letter from the bankrupt to the defendant, dated the 18th of October, 1834, hereinafter set forth.

In June, 1833, in contemplation of the voyage, the bankrupt and defendant entered into an agreement; by which the defendant appointed Captain Driver to the command of the ship Bolton, on her intended voyage to India and back to England; Captain Driver to have, for his own use and benefit, the cabin accommodations for passengers, and for the use of the same; and in lieu of all profits the owner might derive therefrom, he was to pay the owner the sum of 2000*l.*; 1000*l.* parcel thereof, on the ship clearing at the custom-house in London: out of the remaining 1000*l.* he was to pay the ship's disbursements in India, and to remit the balance by good bills on London: the said sum was to cover all claims of the owner on account of the passengers; but should Captain Driver draw any ship's provisions for the use of the cuddy beyond the allowance for himself and his officers, he was to pay the owner for the same.

On the 22d of August, in the same year, a second agreement was entered into between them, by which the defendant permitted Captain Driver to land passengers at Algoa Bay, upon condition of his paying pilotage, port charges, and demurrage.

The cabin stores and furniture were bought and sent on board by and on behalf and for the account of the bankrupt, and were his property. The bankrupt sailed from England, in command of the ship, in September, 1833, and arrived at Algoa Bay in December following, at which place he left the ship for the purpose of attending to his own private concerns, without permission or authority from the defendant. The command of the ship was thereupon taken by the chief mate, Tremlyn, and when the ship was about to sail from Algoa Bay under his command, the bankrupt wrote and delivered to him a letter, in which he said, "I resign the command, fully assured that you will do as much for me and the owner as I could if I proceeded. To remunerate you I place you on the same wages as I have got, viz. 10*l.* per

month; and as I shall find the cuddy, you shall have 20 per cent. on the nett earnings of the passage money home. This is the best terms I can afford to offer. I promised to pay the balance of Powell's bill to Messrs. Bagshaw and Co., Calcutta, that is, as many rupees as would be equal to the amount sterling; this you must do from the proceeds of the felt, and whatever stores you may have to spare, which you will please to sell: should these funds not be equal to the amount required, draw from the Seecar as much as will suffice for that purpose, and remit, on your arrival in India, on account of passage money home, 500*l.*, through the post-office, to my house, Peckham, Surry. You will disburse the ship out of the passage money. The owner's instructions are herewith handed over to you; and I agree to your having the command on the following terms; pay 10*l.* per month, and 20 per cent. on the nett profits of passengers home from Calcutta; the crockery, glass, hardware, and cooking utensils, plate, &c., to be considered, on your reaching Calcutta, to have reduced in value 33½ per cent.; this to be placed to the ship's credit as cuddy stores, and on her return to London to be valued and placed to the credit of the cuddy account."

The defendant, on the 30th of April, 1834, wrote the following letter to Tremlyn, the chief mate, which he received on the arrival of the ship at St. Helena, on her homeward voyage in October, 1834.

"I am desirous of taking the first opportunity to advise you to retain in your own hands any property whatever, money or goods, which you have belonging to Captain Driver. You will, probably, have a private account to settle with him. I shall have a large account to settle with him, in which he will most likely be deeply in my debt; and it will be difficult for you to know what moneys or property belong to him, and what to me as owner of the ship. You will be, therefore, incurring a most serious responsibility, if you give up any thing either to him or to anybody before you know exactly how matters stand, and which you cannot know till you arrive in London. I hear that he intends to join the ship at St. Helena, on her return home; should he wish to do this, you must receive him on board only as a passenger. I hereby confirm you in the command of the ship, and forbid you to give it up to him or to any person whatever."

The ship, under the command of Tremlyn, proceeded to Madras and Calcutta, and thence back to England: the bankrupt returned to England previously to the month of October, 1834, and before the ship arrived.

On the 24th October, 1834, the bankrupt, then in England, dishonoured an acceptance which he had given to one George Browne, for 496*l.* 5*s.* 2*d.*, which debt was subsequently proved by Browne under the fiat of bankruptcy. On the 18th of October, the bankrupt, at the instance of the defendant, both of them being in London, and in personal communication with each other, wrote and delivered to the defendant the following letter:—"Sir, I hereby authorize and request you to keep possession of all cabin furniture, and other property of mine, on board the Bolton, when she arrives, and to place the value of the same to the credit of my account with you."

The fiat in bankruptcy against Driver, was issued on the 18th of December, 1834, on an act of bankruptcy, committed on the 2d December, in that year.

The ship arrived in England on the 5th December; she was imme-

diately boarded, on behalf and by the authority of the defendant, by the ship's husband.

At the time when the above mentioned letter of the 18th of October, 1834, was written and delivered to the defendant as above mentioned, and at the time of the arrival of the ship Bolton, in England, the bankrupt was indebted to the defendant on the balance of account between them in a sum exceeding the value of the said furniture and other property referred to in the said letter of the 18th of October.

The whole of the officers and crew were appointed, paid, and victualled at the sole expense of the defendant.

The plaintiffs, previously to the commencement of the action, duly demanded possession of the said stores and furniture from the defendant, which he refused to deliver up.

The Court ~~was~~ to decide, whether the plaintiffs, as assignees of Driver, were entitled to recover; and if so, the verdict was to stand: but if otherwise, a nonsuit was to be entered.

Hoggins, for the plaintiffs. The verdict ought to stand, for no interest in the goods in question passed to the defendant under Driver's letter of October 18, either by way of lien, or legal or equitable sale. Not by way of lien, for Driver was a joint adventurer in the voyage, and Tremlyn was agent to Driver as to the cabin furniture, and to the defendant as to the rest of the ship. If he was agent for Driver, no lien could arise, for the defendant never obtained possession of the goods. And the letter of the 18th did not amount to a sale, because it imposed no obligation on the defendant, was supported by no consideration, and was, therefore, revocable by Driver. It was a mere authority without an interest, revoked by the bankruptcy, and of no validity against creditors. Even an agreement that the defendant should retain the goods in case of bankruptcy would not avail him, unless he were in possession before the bankruptcy; *Tripp v. Armitage*, 4 Mees. & Welsb. 687; and Tremlyn could not hold them as trustee for the defendant, unless he accepted the trust, *Williams v. Everett*, 14 East, 582, or expressly made an appropriation; *Brind v. Hampshire*, 1 Mees. & Welsb. 365.

Peacock, for the defendant. On Driver's deserting the ship, Tremlyn, the chief mate, took the command as his successor in the owner's right. Tremlyn, therefore, was from that time the agent of the defendant, and not of Driver. The 2000*l.* was to be paid by Driver, not for the use of the cabins, but for the command of the ship; and, when Tremlyn took the command, he took the cabin as well as the rest of the ship, as agent of the defendant.

Then, the letter of October 18th was not a bare authority, but an authority coupled with an interest, and therefore not revocable; *Walsh v. Whitcomb*, 2 Esp. 565: at all events, it gave the defendant an equitable right to take the goods, which would be sufficient as against Driver's assignees; *Winch v. Keeley*, 1 T. R. 619; *Ex parte South*, 3 Swanst. 392. And the debt due from Driver to the defendant was a sufficient consideration for the assignment. In *Bailey v. Culverwell*, 8 B. & C. 448, (15 E. C. L. R. 261,) Culverwell and Co., as brokers for Carrol, sold goods then in their possession, to Halliwell, which were paid for by a bill drawn by Halliwell, and accepted by Walduck. Halliwell ordered Culverwell and Co. to keep the goods in their hands, and sell them if they could make a certain profit. Before the bill became

due, Walduck failed, and Culverwells applied to Halliwell for security for the bill; whereupon he gave them an order to sell the goods and apply the proceeds in payment of the bill. Halliwell afterwards, and before the goods were sold, became bankrupt. Culverwell and Co. handed over the goods to Carrol, at his request, but he afterwards returned them; and, after they were returned, Halliwell's assignees having made a demand of the goods, brought trover. It was held, that they could not maintain it; for, after the order given by Halliwell to Culverwell and Co., to sell the goods and apply the proceeds in payment of the bill, they remained in their hands, subject to that charge, because Culverwell and Co. must be presumed to have asked security as agents for Carrol, whose ratification of their act for his benefit might also be inferred. That case is in point for the defendant. In *Brind v. Hampshire*, the only question was as to the authority; the plaintiff had no interest. In *Tripp v. Armitage* there was no delivery. Here, the letter of October 18th was an order to the defendant to keep that of which he was already in possession by his agent Tremlyn; and even if he were not before that time in possession, it is clear that an assignment may be made of goods at sea; *Haille v. Smith*, 1 B. & P. 563; *Lempriere v. Pasley*, 2 T. R. 485; *Wright v. Campbell*, 4 Brr. 2046.

Hoggins in reply. It is not enough that the defendant was in possession, unless the letter of October 18th operated as a legal or equitable assignment, an effect which, according to the principle laid down in *Tripp v. Armitage*, it could not have, as the possession was never altered. The defendant was to keep possession *when the ship arrived*: that implied that he had no possession before the arrival. The goods remained in the order and disposition of the bankrupt; if they had been destroyed, the loss must have fallen on him; and on that ground also, the plaintiffs are entitled to recover. [MAULE, J. It would be of no avail that they should be in the order and disposition of the bankrupt, unless with the consent of the true owner; and there is here no consent on the part of the defendant.]

TINDAL, C. J. The question in the case before us turns on the point whether or not, at the time of the letter of the 18th of October, 1834, the defendant was in actual or virtual possession of the goods in question; because, if he was, the words used in the letter amount to an equitable mortgage of the goods upon a sufficient consideration, namely, the antecedent debt due from Driver to the defendant. A communication took place between the parties in London, the goods being then at sea on the voyage home, and Driver wrote the letter authorizing the defendant to keep them as a security for the debt due from him: so far the case falls within *Lempriere v. Pasley*. Then the question is, in whose custody the goods were on the 18th of October, 1834. They were the absolute property of Driver when the ship sailed from London. On her arrival in Algoa Bay, Driver, for purposes of his own, quitted the command of the ship, and Tremlyn, the mate, succeeded to it; not as the agent of Driver, but by the law merchant as agent of the owner. It is true a letter was written by Driver, informing Tremlyn of the circumstances under which he had quitted the ship, to which it does not appear that any answer was returned, and the statement in the case is, that the command was taken by Tremlyn, on Driver's giving it up. The defendant, upon hearing of what had happened, confirmed Tremlyn in the command, though he was as much the agent of the defendant.

before the confirmation as after; but that letter of the defendant, in effect, is material, for it shows that part of the goods belonged to the defendant and part to Driver,—“It will be difficult for you to know what moneys or property belong to him and what to me, as owner of the ship:” and this is shown by the meeting of the defendant and Driver in October, when Driver writes, “I hereby authorize you to *keep* possession of all cabin furniture and other property of mine on board the Bolton.” The expression *keep*, implies that Driver knew the defendant was then in possession both of the cabin furniture, and of other property belonging to Driver. To limit this to a keeping on the arrival of the ship and not before, would be a narrower construction than the parties meant to be applied to the expression. I think, therefore, that at the time in question, the defendant was in possession of the property conveyed, and had it on an equitable pledge till Driver’s debt should be satisfied. It has been urged that the letter did not render it obligatory on the defendant to take the goods; and that if they had perished the loss would have fallen on Driver. That observation applies to all cases of the sort: but where cattle are distrained for rent, if they die while in pound, a fresh distress may be made.

Our judgment must be for the defendant.

BOSANQUET, J. The plain question is, whether Tremlyn took possession of the cabin furniture as agent of the defendant, and whether Driver gave the defendant a lien on it by way of security for his debt. Driver being captain of the ship and Tremlyn the mate, Driver deserted the ship at Algoa Bay, and Tremlyn then took the command as agent of the owner. In that command he was confirmed by the letter from the defendant, which reached him at St. Helena, and in which the defendant enjoined him to retain in his own hands any property which he might have belonging to Captain Driver. Tremlyn, therefore, as agent of the defendant, being in possession of the goods, the defendant is constructively in possession; and then, on the 18th of October, Driver, at the request of the defendant, writes a letter authorizing him to *keep* possession, for the satisfaction of his debt. If that does not give a lien, I know not what could give it. It has been contended for the plaintiffs, that the effect of the letter is only to authorize the defendant to detain the goods on their arrival in London. I cannot agree in that construction of the instrument: the word *keep* implies that the goods were already in the defendant’s possession, and therefore our judgment must be for the defendant.

COLTMAN, J. The main question is, in whose possession the goods were on the 18th of October. If the defendant had himself taken possession of the goods when Driver deserted the ship, no doubt could have been entertained; but Tremlyn took possession of them as his agent and by his authority; and, he being so in possession, Driver authorizes the defendant to *keep* the goods: that appears to me to convey a present right of lien: the defendant *had* possession, and then Driver conferred the lien.

MAULE, J. When Driver left the ship, Tremlyn, the mate, took possession for the benefit of the defendant, the owner of the ship. That being so, Driver writes to the defendant in answer to an application for security, “I hereby authorize you to keep possession of all cabin furniture and other property of mine on board, when the ship arrives, and place the value to the credit of my account with you.” Considering

the situation of the parties, the meaning of that letter is, "you have now possession of property of mine, and I authorize you to keep it for the security of your debt."

The goods, therefore, are pledged, and cannot be redeemed without payment of the debt.

Judgment for defendant.

HUNTLEY against BULWER and Others.—p. 111.

Plaintiff being employed as an attorney to conduct an appeal against the removal of a pauper, omitted to enter and respite the appeal at the first sessions after the removal, and proceeded to the second sessions, after having served the respondents with a notice of the grounds of appeal, signed by himself, instead of the overseers of the appellant parish. The sessions having refused to hear the appeal, Held, that plaintiff was not entitled to recover for his services.

THIS action was brought by the plaintiff to recover the sum of 74*l.* 7*s.* 6*d.*, being the balance alleged to be due to him as the attorney employed in prosecuting an appeal for the defendants, who were the church-wardens and overseers of the poor of the parish of Ramsden Bullhouse, Essex, for the year 1835.

The defendants pleaded, first, payment, except as to 3*l.* 12*s.* 2*d.*, parcel, &c.; secondly, a set-off; thirdly, payment of the 3*l.* 12*s.* 2*d.* into Court; and *non damnificatus ultra*.

At the trial before TINDAL, C. J., it appeared that, on the 12th of December, 1835, an order under the hands and seals of two magistrates of Kent, was made for the removal of a pauper from the parish of Holy Cross, Westgate, in Kent, to the defendants' parish.

On the 29th December, the defendant Bulwer, instructed the plaintiff to prosecute an appeal against such order; and the plaintiff, upon looking at the order, observed, "you have just hit it," meaning that there was just time to give notice of appeal for the then next sessions to be holden at Maidstone on the 7th January, 1836. The plaintiff thereupon prepared the notice of appeal and statement of grounds thereof, and served the same on the 31st December, though the practice of the sessions required that the notice of appeal should be served at least eight clear days before the sessions; and notwithstanding the eighteenth section of the 4 & 5 W. 4, c. 76, requires that the statement of the grounds of appeal shall either be given with the notice of appeal, or fourteen days, at least, before the first day of the sessions at which the appeal is intended to be tried, and that such statement shall be signed by the overseers or guardians of the poor of the appellant parish, the statement of the grounds of appeal delivered by the plaintiff was not signed by the overseers.

The county of Kent is divided into two sessional districts, and the respondent parish is situated in the eastern division, the sessions for which were holden at Canterbury, on the 5th of January, 1836.

The plaintiff went to the sessions at Maidstone, where the respondents objected to the hearing of the appeal, contending that it should have been entered at Canterbury; and that the notice of the grounds of appeal should have been signed by the overseers, and delivered fourteen days before the sessions. By the indulgence of the Court, however, and by the consent of the respondent's solicitor, and upon payment of 16*l.* for the respondent's costs, leave was given to enter the

appeal at Maidstone, and respite it to the next sessions for the eastern division of the county of Kent, to be held at Canterbury in April, 1836. But instead of entering the appeal, and obtaining an order to respite it to the following sessions for East Kent, the plaintiff left Maidstone, and took no further steps in the matter at that time.

In February, 1836, he served fresh notices for the following sessions, to be held at Canterbury; but the notice of appeal and of the grounds thereof, were again signed by the plaintiff as attorney for the officers of the appellants parish, instead of being signed by the parish officers.

The plaintiff, with the defendant Bulwer and the witnesses, went to Canterbury, and were met at the sessions by the respondent's solicitor, who objected to the appeal being heard, on the ground that it had not been entered at the last Maidstone sessions, and respited to the then following sessions at Canterbury. The justices refused to hear the appeal; and the order of the magistrates for the removal of the pauper stood confirmed.

The plaintiff, before he started for the sessions in April, 1836, applied to the parish officers for an advance of 20*l.* towards paying the expenses of his journey and the fees of the appeal; two of the defendants and an occupier in the parish, consented to advance out of their own pockets the sum of 5*l.* each, which they paid to the plaintiff, and for which he gave credit in his bill.

It was objected, on behalf of the defendants, that the plaintiff's ignorance in the matter of the notices, and his negligence in omitting to enter and respite the appeal at Maidstone, had rendered his services mischievous to the parish, by fixing it with a pauper who might otherwise have been removed, and that therefore this action did not lie; and the chief justice being of that opinion, the plaintiff was nonsuited, with leave to move to set aside the nonsuit and enter a verdict instead.

Wilde, Serjt., obtained a rule *nisi* to that effect, chiefly on the ground that the defendants, after paying 15*l.* in part of the plaintiff's bill, were precluded from saying that his services were useless: and that if negligence were set up as a defence, it ought to have been pleaded.

Kelly and *James* showed cause. The defendants are not bound by an advance of money made previously to the sessions at which the appeal was rejected, and before the plaintiff's ignorance and negligence were discovered. His services having turned out useless he was not entitled to make any charge for them, and the propriety of the nonsuit cannot be impeached. *Hill v. Featherstonhaugh*, 7 Bing. 569, is in point.

Wilde and *Hughes*, in support of the rule, contended there was no such negligence as ought to deprive the plaintiff of his right to a verdict. An Essex attorney was not bound to know the sessional divisions of the county of Kent, or the exact time for notice required by those sessions: six days was not sufficient time to enable the appellants to inquire into the particulars of their case; they were not bound therefore to go to the sessions at Maidstone; and those sessions had no authority to enter and respite a case from a parish in the eastern division; the April sessions at Canterbury were, under the circumstances, the first possible sessions for the appellants; the Court there ought to have heard the appeal; and might have been compelled to do so by *mandamus*; the plaintiff was not responsible for their refusal, or for the event of the appeal. The respondents, by raising objections to the hearing at the

Canterbury sessions, had in effect violated the agreement they entered into at Maidstone, and the plaintiff ought not to suffer for misconduct over which he had no control.

TINDAL, C. J. One thing is quite clear: that the defendants have derived no benefit from the work and labour in respect of which the plaintiff sues. What they bargained for was, that the question, whether or not the pauper belonged to their parish, should at least be tried. But every step taken shows that the plaintiff was ignorant of the rules of law by which he was to obtain a trial. First, he gives six days' notice instead of eight, and goes to the sessions of the Western division of Kent instead of those of the Eastern, to which the respondent parish belonged. When he found he was wrong both as to time and place, he might still have entered and respited the appeal at Maidstone for the next sessions at Canterbury. But, as he omitted to do that, the agreement he made with the respondent's attorney was altogether nugatory. Even if he had entered the appeal at Maidstone, there was another objection fatal to its being heard at Canterbury: the statement of the grounds of appeal ought to have been signed by the overseers of the appellant parish; but the plaintiff omitted to obtain their signature, although his bill contained a charge for attendance. In the whole conduct of the business there is a want of that fair professional skill which every attorney is bound to bring into the market, and, therefore, this rule must be discharged.

BOSANQUET, J. The question is, whether the labour for which the plaintiff charges, has not proved wholly useless to the defendants by reason of gross negligence in the plaintiff. The objection is, not that the proceedings in the appeal have turned out unproductive, and that the claim of the parish officers to settle the pauper on the respondent parish, has been defeated; but that, owing to the plaintiff's default, the appeal has not been tried.

It is necessary that an appeal should be made to the next practicable sessions; but it is sufficient if it be entered and respited at those sessions.

The plaintiff is employed just before the Epiphany sessions, 1836, and he says to his employers, "you have just hit the time;" and so they had; for though they were not in time to try, it was competent to them to have entered and respited either at the Canterbury or Maidstone sessions, and they had ample time to do so. The plaintiff, however, although he went to Maidstone, omitted to make any entry, and when he applied to the Easter sessions at Canterbury, the Court refused to hear him, on the ground that they had no jurisdiction, the appeal not having been entered and respited at the previous sessions. The plaintiff says he was led into this by an agreement with the respondent parish: the agreement was, that he should enter and respite at Maidstone, and try at Canterbury, and he omitted to enter and respite: but if he had entered into an agreement that the appeal should be tried at a sessions which had no jurisdiction to hear it, that is part of his own negligence and ignorance, and cannot bind the defendants. Even if the Easter sessions had had jurisdiction to try, it would not have availed the plaintiff, for he had not delivered, fourteen days before the sessions, notice of the grounds of appeal signed by the parish officers: the defendants, therefore, have derived no benefit from his services, and this rule must be discharged.

MAULE, J. I am of opinion that it is a sufficient defence to this

action that a consideration for the plaintiff's demand does not arise. The plaintiff undertook to put the defendants in the way of trying their appeal at the quarter sessions; he has not done that, but has failed, from gross ignorance or negligence. If he did not understand this branch of his business, he should have sought assistance from some one more versed in it. The stat. 9 G. 1, c. 7, s. 8, gave him a right to enter and respite at the Epiphany sessions; he was ignorant of that very familiar law; and he seems never to have looked at the eighty-first section of 4 & 4 W. 4, c. 76, which requires that the fourteen days' notice of the grounds of appeal shall be signed by the overseers themselves. In consequence of his ignorance, the whole proceeding has failed to give the parish an opportunity of trying the appeal on its merits. Instead of that, he purchases of the respondent parish for 16*l*., what they could not grant, but what he had a right to do for nothing; namely, to enter and respite the appeal. Supposing even that there had been an agreement that he should try at the Easter sessions without such entry, it is very doubtful whether those sessions could have acted on such an agreement, for they might thereby have been dealing with the interests of other parishes not parties to the agreement.

As the plaintiff omitted to enter and respite the appeal at the first sessions, or even to deliver a notice signed by the overseers for the second, the charge of gross ignorance or negligence has been made out, and this rule must be

Discharged.

COLTMAN, J., was absent.

BROWN against WATSON.—p. 118.

Upon a reference of a cause and of all matters in difference between plaintiff and defendant, the main question was, which of them should pay the expenses of a ship, in which they had been jointly interested, incurred after March 24th, 1838. The arbitrators directed plaintiff to pay them, and to give defendant a bond of indemnity against the payment of such expenses. Held, that the award was good.

By a judge's order, this cause and all matters in difference between the parties were referred to arbitration; and it was ordered that the plaintiff should purchase of the defendant and the defendant sell to the plaintiff a moiety of the brig *Test*, for 940*l*.; and that if the arbitrators should find any money to be due from the defendant to the plaintiff, the moiety of it should be paid by the defendant at such time and place as the arbitrators should direct, and the remaining moiety be retained by the defendant in part payment of the said sum of 940*l*. for the defendant's share of the brig; and should it exceed 940*l*., then the plaintiff was to mortgage the brig to the defendant for the deficiency: that on the day the arbitrators should direct the defendant to pay the moiety of the sum due from him, he should deliver to the plaintiff a bill of sale of the defendant's moiety of the brig, and the plaintiff should at the same time execute and deliver to the defendant a mortgage of the brig, to secure to him the difference between the sum to be paid by him and 940*l*.; and that the arbitrators should be at liberty to award to the plaintiff, if they should think fit, such sum as he might be entitled to, if any, in consequence of his providing another master to take charge of the brig on her then present voyage from London to Arch

angel and back, in order to have the matters in difference brought to a speedy conclusion.

By their award, bearing date May 29th, 1839, the arbitrators found that there was due from the defendant to the plaintiff in respect of the cause and matters in difference (including the sum which, in the judgment of the arbitrators, the plaintiff was entitled to in consequence of his providing another master to take charge of the brig on the said voyage,) 57*l.* 17*s.* 6*d.*, a moiety of which they directed the defendant to pay to the plaintiff on the 8th June, 1839, the other moiety to be retained by the defendant in part payment of the purchase money of his share of the brig: they awarded that the parties should pay in equal moieties all debts incurred in respect of the brig previously to the 24th of March, 1838, and that the defendant should not bear any portion of the debts incurred for the brig after that day: they then ordered the plaintiff, at his own expense, to prepare and deliver to the defendant on the 8th of June, 1839, a bond in the penal sum of 1500*l.*, conditioned for the payment by the plaintiff of all debts incurred in respect of the brig, subsequently to the 24th of March, 1838.

On an affidavit, that between the 24th of March, 1838, and the 3d of August, 1838, (on which latter day the plaintiff agreed with the defendant for the purchase of his moiety of the brig,) the debts incurred in respect of the brig amounted to 100*l.* and upwards, and that had the plaintiff known that the arbitrators had power to order the plaintiff to pay all the debts incurred subsequently to the 24th of March, he would not have consented to give so much as 940*l.* for the defendant's moiety of the brig.

Kelly, obtained a rule nisi to set aside the award on the following grounds: First, that the award was not final or certain, the arbitrators not having stated what portion of the sum of 57*l.* 17*s.* 6*d.*, they had awarded in respect of providing another master to take charge of the brig on the voyage from London to Archangel and back; and the arbitrators having no authority to direct a moiety of the 57*l.* 17*s.* 6*d.*, to be paid and retained as they had done; secondly, that the arbitrators had not ascertained the amount of the debts which they had directed to be borne in equal moieties; that they had made no provision for the payment of such debts, nor for the repayment of any sum by one party to the other, in case either party should pay more than one moiety of such debts; and that they had made no final award or adjustment of the said debts; thirdly, that the arbitrators had no power to order such bond to be given as stated in their award.

Wilde, Serjt., and *Martin*, showed cause on an affidavit, which stated that the defendant having had several disputes with the plaintiff about the brig, caused the proposed employment of her by the plaintiff to be stopped on the 24th of March, 1838, by process out of the Admiralty Court: that the disputes continued from that time till the 3d of August, when the agreement was come to which is embodied in the above reference: that there was no matter in difference as to the amount of the debts due in respect of the brig, or the mode of paying them, nor were the arbitrators called on to ascertain them; but the principal matter submitted to them was, up to what date the joint liability ought to continue, and from what date the plaintiff should be separately chargeable.

Upon this, the second objection being abandoned, it was contended

that under the authority to settle all matters in difference, the arbitrators were bound to award a sum for the expenses of the voyage pending at the date of the submission; and as there had been no question before them as to the precise amount, it was not necessary to show on the face of the award how much of the 57*l.* 17*s.* 6*d.*, was applied to the charge for providing a new master, and how much to other expenses. With respect to the bond, *Cooke v. Whorwood*, 2 Saund. 337, was an express authority, that an award that one of the parties shall be bound in a bond is good: and in *Phillips v. Knightley*, Str. 903, an award that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages, and expenses which should happen by means of any further proceedings in an action begun at the instance of the defendant, was held good.

Kelly and Butt, in support of the rule. The expense of providing a new master on the voyage pending at the date of the submission, could not have been incurred till after the submission; and, therefore, the arbitrators had no authority to deal with it. The bond in *Cook v. Whorwood*, was a bond for the payment of money at a certain time, and, therefore, in its nature final. The bond here was a bond of indemnity, and the obligee might have occasion to resort to it during an indefinite period; the award, therefore, left the differences between the parties still unsettled.

TINDAL, C. J. The first objection now insisted on is, that the arbitrators had no authority to deal with what was paid for providing a new master on a voyage pending at the date of the submission. And, looking at the terms of the submission, I think the objection ought not to prevail. All matters in difference are referred; and, if any sum of money is found to be due from the defendant, it is to be paid at such time and place as the arbitrators shall direct. That seems to refer to past debts; but the next power given seems to treat this growing demand as if it were bygone; for the words are, that the arbitrators shall award to the plaintiff, if they think fit, such sum as he may be entitled to, if any, in consequence of his providing another master for the brig on her then present voyage, in order to have the matters in difference brought to a speedy conclusion. It is laid down in Com. Dig. *Arbitration*, E. 9, "There shall not be a constrained construction to make it to be out of the submission." The only remaining objection is, that the arbitrators had no power to order the plaintiff to deliver a bond to the defendant: if that were so, it would only avoid the award *pro tanto*; but I am of opinion that they had such power. In *Phillips v. Knightley*, an award that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages, and expenses which should happen by means of any further proceedings in an action begun at the instance of the defendant, was held good; and in *Cooke v. Whorwood*, it is laid down, that though an award that a party shall find a surety to enter into a bond is bad, an award that he shall himself be bound in a bond is good.

BOSANQUET, J. I think the payment ordered to be made by the defendant in respect of the expense of providing a new master is consistent with the terms of the order of reference, which treat it as one of the matters in difference; and that when the arbitrators had authority to say what should be paid in respect of the master, they had authority to say at what time it should be paid. With respect to the

bond, one of the matters in difference was, whether the debts incurred in respect of the brig after a certain day should be paid by the plaintiff, or defendant, or by both: the arbitrators have found that they should be paid by the plaintiff; but, as the creditors were not bound by the award, the arbitrators provided what was necessary to carry their award into effect, and to secure the defendant. *Cooke v. Whorwood* is an express authority that arbitrators may award a bond to be executed by one of the parties, though not by a surety for him.

MAULE, J. As to the first objection, I have no doubt that the arbitrators, on taking the account, were bound to allow the plaintiff what he had paid towards the expense of providing a new master.

Upon the point of the bond I do not feel so clear; but it is the less material, as, if the objection were allowed to prevail, the award would only be bad *pro tanto*. I think the arbitrators might order a bond for money to be paid at a certain day; but that it is not necessarily within their powers to order a bond indemnifying a party against sums to be paid to others.

Rule discharged.

COLTMAN, J., was absent.

See *Ross v. Boards*, 8 Adol. & Ell. 290, (35 E. C. L. R. 390.)

STORY against RICHARDSON and Another.—p. 123.

Plaintiff and his two partners employed defendants as accountants, for hire to make out the accounts of the firm, and of the separate balance of each partner: defendants made out plaintiff's separate balance so erroneously and negligently that, relying on their statement, he was a considerable loser thereby: Held, that plaintiff might sue alone in case for this misfeasance, and that it was no variance to allege that he had employed defendants.

THE first count of the declaration stated, that before and at the time of the retainer and employment of defendants, and of their committing the grievance hereinafter mentioned, the defendants exercised and carried on the business of accountants; that also before the retainer and employment, and before the committing of the said grievance, to wit, for and during the year 1834, the plaintiff, together with one Hugh James and Richard Robinson, had carried on the trade and business of tailors in copartnership; and they, at the time of such retainer and employment, continued to carry on that trade and business in copartnership, and there were divers accounts subsisting between and amongst them in reference to the said copartnership during the said year 1834, and they were desirous of having the same investigated, made up, and settled: and, thereupon, on the 1st of January, 1835, the plaintiff, at the request of the defendants, and for reward to them in that behalf, retained and employed them as such accountants, to investigate, settle, and make up the accounts of the said copartnership for and during said year 1834, and to make and draw up a final balance of such accounts, and the respective balances due to each of them, the plaintiff, H. James, and R. Robinson, and to prepare a correct statement in writing showing such final balance of such accounts, and the respective balances due to each of the partners; and the defendants then accepted and entered upon the said retainer and employment: and, thereupon, it then became and was their duty as such accountants, under the said

retainer and employment, to take due and proper care, and use and employ due and proper skill and diligence, in and about the investigating, settling, and making up the accounts of the said copartnership during the said year, and in making and drawing up a final balance of such accounts, and the respective balances due to each of the partners, and in and about the preparing the said statement. Averment, that the defendants did thereupon proceed to investigate, settle, and make up the said accounts for and during the said year; and did make and draw up certain balances as and for the said balances so to be by them made and drawn up as aforesaid, and did prepare a statement in writing as and for the statement so by them to be prepared as aforesaid: yet the defendants, not regarding their duty in that behalf, did not nor would take due and proper care, and use and employ due and proper skill and diligence, in and about the investigating, settling, and making up the said accounts for and during the said year, and in and about the making and drawing up a final balance of such accounts, and the respective balances due to each of the partners, and in and about the preparing of the said statement; but on the contrary took so little and such bad care, and used and applied so little skill and diligence in that behalf, that by reason of the carelessness, unskilfulness, and negligence of the defendants in that behalf, the said balances, so to be by the defendants drawn up as aforesaid, were grossly incorrect, erroneous, and improper balances; and the said statement so by them prepared was an incorrect, erroneous, and imperfect statement, containing divers errors, mistakes, omissions, and imperfections, and showing and stating an incorrect statement of the said accounts during the said year, and an incorrect balance of the same, and incorrect balances actually due to each of the partners: and the plaintiff averred that he, confiding in the defendants' performance of their said duty, and not knowing of the breach of the same, and believing that the said balances so made and drawn up by the defendants were correct, and that the said statement so made by the defendants was a correct statement, and not knowing the contrary thereof, afterwards, to wit, on the 15th of March, 1836, did, with the said H. James and R. Robinson, agree to admit that the said balances so made and drawn up were correct balances, and that the said statement so made by the defendants was a correct statement. the declaration then stated that the affairs of the firm having been submitted to arbitration, and the arbitrator having made an award conformable to the defendants' statement of the accounts, the plaintiff, by means of the premises and of the award, and in pursuance thereof, was afterwards obliged to pay to H. James the sum of 2850*l.* awarded to be paid to him, and afterwards placed to the credit of R. Robinson, the sum of 3600*l.* in a new firm of Story and Robinson, awarded to be placed to that credit; and by means of the several premises the plaintiff lost and was deprived of the said sums of money, which the arbitrators, but for the misfeasance of the defendants, would not have awarded to be paid by the plaintiff, and to be placed by him to the credit as aforesaid: to the plaintiff's damage of 5000*l.*

Plea,—That the plaintiff did not retain and employ the defendants in manner and form as in the first count mentioned.

It appeared at the trial that the defendants, in the capacity of accountants, undertook, at the request of the firm to which the plaintiff belonged, to make a correct statement of the accounts of the firm, and

of the final balance of such accounts, and of the balance due to each of the partners respectively.

The defendants drew up the separate balances, however, very inaccurately, and the plaintiff, relying upon them, paid to his partners a large sum, which he ought not to have paid.

It was objected, on the part of the defendants, that they were employed by the entire firm; that the action ought to have been brought in the names of all the partners; and that the allegation that the plaintiff had employed the defendants having been disproved by the nature of the work the defendants had done, the plaintiff ought to be nonsuited. The objection was overruled, and a verdict was found for the plaintiff, with leave for the defendants to move to set aside if the Court should be of opinion that the objection ought to prevail.

Sir *F. Pollock* having obtained a rule *nisi* accordingly,

Wilde, Serjeant, *Crowder*, and *Hoggins*, showed cause. There was a several employment by each of the partners, and a several undertaking to settle the accounts of each, as well as a joint employment by the whole firm. But the action is *ex delicto*, not *ex contractu*; the plaintiff is the only person injured; and therefore the only one who could sue for the injury. It is immaterial by whom the defendants were employed or paid, if they had a duty to perform to the plaintiff separately, and he has sustained damage by their neglect of that duty.

In *Gladwell v. Steggall*, 5 New Cases, 733, (35 E. C. L. R. 292,) the declaration stated that the plaintiff, an infant, had employed the defendant, a surgeon, to cure her, and then claimed damages for a misfeasance: plea, that the plaintiff did not employ the defendant: it was held, that it was immaterial *by* whom the defendant was employed; or that, if material, the plaintiff's submitting to the defendant's treatment was sufficient proof of the allegation of the employment by her.

At all events the Court has the power to amend, notwithstanding a distinct issue has been taken on the fact of employment; *Jerv. Rules*, 202, 203, last edit.; for the objection is purely technical, and does not affect the merits of the case. If the plaintiff had alleged in the declaration that the plaintiff jointly with two others employed the defendants, and that they misstated the plaintiff's balance, the cause of action would have been in effect the same.

Sir *F. Pollock*, *Talfourd*, Serjeant, and *V. Lee*, in support of the rule. This was substantially an action on a contract entered into by the defendants with the plaintiff and his partners; and it was not competent to the plaintiff by suing in form *ex delicto*, and alleging that as a duty which was in effect a promise to alter the situation of the parties, or subject the defendants to the chance of three actions instead of one. The contract, therefore, should have been stated as a contract between the plaintiff's firm and the defendants; *Weall v. King*, 12 East, 452; *Ireland v. Johnson*, 1 New Cases, 162, (27 E. C. L. R. 341.) There was no evidence of any but a joint employment by the firm, and out of that, no duty would be cast on the defendants on which each partner might maintain a separate action for a separate injury. In *Gladwell v. Steggall* the law implied a duty in the defendant, independently of any retainer; in the present case the duty could only arise out of the retainer.

And the plea having put the duty in issue, no amendment can be made except upon payment of the costs of the trial. [TINDAL, C. J. All you can contend for is, that the declaration should have alleged that

the plaintiff, with two others, employed the defendants: what difference could that make in the merits?] The defendant might have demurred to the declaration.

TINDAL, C. J. In this case the Court is called on to say whether or not there is any variance between the allegations in the declaration, and the proof adduced at the trial; and I think that there is no such variance as the defendants set up.

The objection is, not that the other two partners ought to have joined in the action,—for as it is conceived in tort, that could only have been pleaded in abatement, and no joint damage has been alleged,—but that the evidence does not support the statement in the declaration. The statement in the declaration is, “that the plaintiff and two others, being partners, and being desirous of having their accounts investigated and settled, the plaintiff, at the request of the defendants, and for reward to them in that behalf, retained and employed them to investigate and settle the accounts of the partnership, and make and draw up a final balance of such accounts, and the balances due to each of the partners respectively: that thereupon it became the duty of the defendants to take proper care and employ due skill in investigating and settling the accounts of the partnership; and in making and drawing up a final balance of such accounts, and the balances due to each of the partners respectively.” Up to a certain point the duty of the defendants was one in which all the partners had a common interest; but as to the separate balances, they were in interests adverse to each other; and the declaration goes on, “that the defendants took so little care, that the balances were incorrect, showing an incorrect statement of the accounts of the partnership, an incorrect balance of the same, and incorrect balances actually due to each of the partners;” a statement of facts which is in applicable to any joint damage sustained by all three together.

The evidence was, that the three partners called in the defendants to settle their accounts; to make up a general balance of the accounts of the firm, and a particular balance showing the state of the accounts as between each of the partners. Then, is the allegation that the plaintiff employed the defendants to make out a balance sheet for him, consistent with that evidence? I think it is not inconsistent with it. No proof was given of any joint injury sustained by the partners, and the evidence might fairly be applied to that portion of the employment which the defendants undertook for the plaintiff alone. It is no new proposition, that where there is a joint contract, if either of the parties has a separate interest, he may sue separately in respect of such interest; note to *Ecclestone v. Clipsham*, 1 Wms. Saund. 154. I think, therefore, that the present rule must be discharged.

BOSANQUET, J. This is an action arising out of a contract in which the plaintiff and others have a joint interest, and each of them has also a separate interest; and on that separate interest the duty has arisen in respect of which the plaintiff seeks to charge the defendants. The defendants were employed to make out the accounts of the partnership generally, and the balance of each partner separately, and if they are guilty of negligence by which one of the partners suffers, he may sue separately in respect of such negligence.

It is objected, that as the defendants were retained by the plaintiff and two others, there is a variance between the proof and the allegation; but it is true that they were retained by the plaintiff, though they were

retained by the others also. If there had been any joint injury, the non-joinder of the others could only have been taken advantage of by plea in abatement: and the evidence was sufficient to show that the defendants had a duty to perform to each of the partners separately; so that, even if the plaintiff had sued in form *ex contractu*, his declaration had been right. *Gladwell v. Steggall* is in point for the plaintiff. There the defendant, a surgeon, was sent for by the plaintiff's mother, and had been paid by her father; and yet the plaintiff's submitting to his treatment, was held sufficient proof of the allegation that the defendant had been employed by the plaintiff to cure her. Surely that goes as far as the present case, where the plaintiff himself was one of the persons who employed the defendants.

MAULE, J. I am of opinion that no variance has been made out, for the case affords ample evidence of a separate retainer by the plaintiff. In a case of disputed partnership accounts, the firm agrees that the defendants shall be employed by the firm, and by each of them separately, to settle the accounts, and to make out the balance belonging to each. The duty of the defendants must be inferred from the nature of the thing to be done: there was a contract between the defendants and each of the partners, as well as a contract between the defendants and all. Whether, from such a contract, a duty arises which may be the subject of an action *ex delicto*, is a question which arises on the record, but does not call for decision now.

Rule discharged.

COLTMAN, J., was absent.

SKINNER against SHOPPEE and Wife.—p. 131.

Slander; verdict for defendant on the general issue; for plaintiff, without damages, on a plea of justification:

Held, that notwithstanding 21 Jac. 1, c. 16, s. 6, plaintiff was entitled to his costs occasioned by the plea of justification.

To an action for slandering the plaintiff, a surgeon, by imputing immoral conduct, *per quod* he lost his practice,—the defendants pleaded Not Guilty, and a justification.

The defendants called no witnesses to establish their plea of justification; but it turned out that the defamatory words complained of, were uttered under circumstances which rendered them a privileged communication:

Whereupon, a verdict was found for the defendants upon the general issue, and for the plaintiff upon the issue on the plea of justification.

The master having declined to allow the plaintiff his costs upon that issue, on the ground that under the statute 21 Jac. 1, c. 16, s. 6, if in actions for slander the jury assess the damages under 40s., the plaintiff shall have only so much costs as the damages given amount to.

Bingham, in Trinity term, obtained a rule *nisi* for taxing the plaintiff his costs occasioned by the plea of justification, on the ground that the statute of James did not apply to a case like the present.

Bompas, Serjt., who showed cause, contended that, as the plaintiff had recovered no damages, he was entitled to no costs, by the express

provision of that statute. In *Milner v. Graham*, 2 Dowl. 422, the defendant was held entitled to the costs of all the issues found for him, though they exceeded the costs of those found for the plaintiff.

Bingham, in support of the rule. The plaintiff having succeeded on the second issue, is entitled to the costs of that issue under the statute 4 Ann. c. 16; *Spencer v. Hamerton*, 4 Adol. & Ell. 413, (31 E. C. L. R. 101;) *Hart v. Cutbush*, 2 Dowl. 456: rule 7, Hilary, 4 W. 4, gives the costs of the evidence as well as the pleadings; and the statute of James does not apply, either in its letter or spirit, to a case like the present. The letter of the statute applies only to cases where the jury assess *some* damages; here they have assessed none. The spirit of the statute applies to frivolous actions where the jury, by a verdict for one shilling or one farthing, declare in effect that the plaintiff ought not to have appealed to the law: but a verdict of not guilty, on the ground of privileged communication, is not incompatible with the plaintiff's having sustained serious injury from unfounded statements; and till the hour of trial he may have had no means of discovering that the statement he complains of was a privileged communication. In *Milner v. Graham*, the plaintiff recovered a farthing damages; that case, therefore, has no bearing on the present question.

Cur. adv. vult.

TINDAL, C. J. The plaintiff declared in this case for defamatory words spoken of him in his profession of a surgeon, and the defendants pleaded to the declaration, first, not guilty; secondly, a justification, that the words spoken were true. At the trial of the cause, no evidence whatever was given by the defendants upon the second issue, and the jury accordingly found their verdict upon that issue for the plaintiff. But under the issue on the first plea of not guilty, the defendants proved that the words were spoken under circumstances which made the uttering of them a privileged communication, and upon that issue the verdict was for the defendants; and the master having disallowed the plaintiff's costs on the second issue, on the ground that the case fell within the statute of James, the present application was made to the Court that the master should review his taxation, and allow the plaintiff his costs on the plea of justification and issue thereon found for him.

The plaintiff, under the statute 4 Ann. c. 16, would, in ordinary cases, be entitled to the costs of the plea found in his favour, there having been no certificate by the judge who tried the cause, that the defendants had probable cause to plead such matter; and that rule would govern the present case, unless it falls within the statute 21 Jac. 1, c. 16, s. 6, by which it was enacted, that in all actions for slanderous words, if the jury find or assess the damages under 40s., then the plaintiff shall have and recover only so much costs as the damages so given shall amount unto. And on the part of the defendants it is argued, that as the general issue has been found for the defendants, the plaintiff has recovered no damages at all, and therefore within the principle of that act is not entitled to any costs. But we think, adverting to the language of the clause referred to, it does not govern the present case. That statute intended only to provide for the case of frivolous actions of slander, where the jury, after hearing the merits, have decided, affirmatively, by their verdict, that the plaintiff is entitled to less damages than 40s. on account of the words spoken. In this case, however, the jury have

made no estimate at all of the damages sustained by the plaintiff, by reason of the defendant's excuse for speaking the words; so that it cannot be said that the damages might not far exceed the sum of 40s., if that question had come before the jury.

The case referred to, of *Milner v. Graham*, appears to have no application to the present; as in that case the plaintiff recovered one farthing damages, and the point raised was in fact wholly different.

We think, upon the above ground, the enactment of the statute of James does not apply to the present case, but that it must be governed by the statute of Anne, and we therefore make the rule absolute.

Rule absolute.

LONDON and BRIGHTON Railway Company, against WILSON.

Same against FAIRCLOUGH.—p. 135.

By the terms of a railway act, the directors were entitled to recover for calls in arrear, upon proving that the defendant was a proprietor, and that notice of the calls was given according to the act, unless the defendant should prove that he had paid the full amount of his subscription. Defendant having pleaded to an action for calls, that he was not indebted, and was not a proprietor, the Court refused to allow him to add pleas that due notice of the calls was not given; that no time or place was appointed for payment; that the calls were made for purposes other than those warranted by the act; that they were made after deviations in the line; and that fewer shares were allotted than the act required.

THESE were actions by the directors of the Brighton Railway Company against proprietors, for calls.

Wilson sought to plead,

1. That the defendant was never indebted :

2. Not a proprietor :

3. Due notice of calls not given :

4. No time or place appointed for payment :

5. That the calls were made for other purposes than those warranted by the act of parliament.

Fairclough sought to plead,

1. Never indebted :

2. Not a proprietor :

3. Fewer shares allotted than the act required :

4. Deviations in the line of railway; and that the call was made to carry on the railway after such deviations.

A judge at chambers having refused to allow Wilson to plead the third, fourth, and fifth of the pleas he proposed, and Fairclough the fourth of those which he proposed,

Rules *nisi* were obtained for discharging the judge's order, and allowing the defendants to plead all the above pleas.

Wilde, Serjt., and *Swann*, who showed cause, referred to the Railway Act, 1 Vict. c. cxix., and particularly to sections 146 and 148, by which it is enacted, "That the said directors shall have power from time to time to make such calls of money from the subscribers to, and proprietors of, shares in the said undertaking to defray the expenses of and carrying on the same, as they from time to time shall find necessary:"—"and twenty-one days' notice at the least shall be given of every such call by advertisement inserted in one or more London

newspaper or newspapers; and all moneys so called for shall be paid to such persons and in such manner as in such notice shall be appointed." Sect. 148,—“That in any action to be brought by the said company against any proprietor in the said undertaking to recover any money due and payable to the said company for or by reason of any call made by virtue of this act, it shall be sufficient for the said company to declare and allege that the defendant, being a proprietor of a share or so many shares (as the case may be) in the said undertaking, is indebted to the said company in such sum of money as the call or calls in arrear shall amount to,—whereby an action hath accrued to the said company by virtue of this act; without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of such share or shares in the said undertaking as such action is brought in respect of, or some one such share, and that such notice was given as is directed by this act of such call or calls having been made, without proving the appointment of the directors who made such call or calls, or any other matter whatsoever; and the said company shall thereupon be entitled to recover what shall appear due.”

They contended thereupon, that all the pleas except the two first were unnecessary, but consented to allow the third and fourth proposed by Wilson to be given in evidence under the general issue. They objected however to the fifth, and to the third and fourth proposed by Fairclough, on the ground that they would lead to inquiries as to the concerns of a partnership which this Court was not competent to enter into, and which would render it impossible for the directors ever to enforce a call.

Crompton for Wilson, and *Cowling* for Fairclough, in support of the rule.

To give the evidence proposed under the general issue would not be sufficient for the defendants; they were entitled to have their objections on record; and no inconvenience would be occasioned to the plaintiff by the admission of any of the pleas, since the burden of proof must fall on the defendants. The question on the present occasion was not as to the goodness of the pleas, but whether in effect they offered different defences: by sect. 6, the directors had only the power to deviate 100 yards: they were indictable if they went beyond that limit; and they could not raise money for the purpose of committing an indictable offence: the deviation might be to such an extent as to amount to a different line; that would present a question as to the construction of the act of parliament by this Court, and not a mere partnership dispute cognisable only by a Court of Equity. The number of shares too, which were required for carrying on the concern, was a matter which this Court was competent to determine, on the construction of sect. 136, by which it is directed that the capital shall be 1,800,000*l.*, shall be allotted according to agreement between the promoters of the several lines, and divided into thirty-six thousand shares of fifty pounds each.

TINDAL, C. J. It appears to me that, when we are called on to exercise our discretion as to certain pleas being allowed, we must see the powers with which we are armed by the statute of Anne; and it is quite clear, that in a case where the pleas are such as not to involve the real justice of the case, but to lead to great expense and intricacy

at the trial, it is the exercise of a sound discretion not to allow them to be put on the record. Such was the case, to a considerable extent, in a former cause in this court, which is often referred to, namely, that of *Gully v. The Bishop of Exeter*, 5 Bingh. 42, (15 E. C. L. R. 360.)

The question, therefore, is, whether these are pleas which, looking at the intention of the statute of Anne, we ought to allow to appear as answers to the action; and I think that not any of the pleas which have been refused by the judge at chambers ought to be allowed.

The two first, which have been refused, are simply unnecessary; because, in point of fact, the subject-matter which they profess to deny must, by the terms of the act, be shown by the plaintiffs themselves in evidence at the trial. By the 148th section, it is expressly thrown on the plaintiffs to give proof of the two facts which these pleas deny: "on the trial of such action it shall only be necessary to prove that the defendant, at the time of making the respective calls, was a proprietor, and that such notice was given, as is directed by the act, of such call or calls having been made." Now these words, though used with the qualification, "it shall only be necessary to prove" so and so, imply a direct affirmation that the plaintiffs shall prove up to that. And the plea of never indebted calls on the plaintiffs, before they have any right to say such debt is recoverable, to prove the conditions precedent as to notice, which the act has imposed on them.

The third plea asked for is a plea in substance and effect that the calls were made for other purposes than those mentioned in the act. Now the question is, whether that plea can, with any degree of justice to the parties concerned in litigation, be put on the record. In the first place, it would be an extremely difficult plea to prove at Nisi Prius. Who can show what the intention of the parties was at the time the money was called for by order of the directors? In the next place, is it at all material, what their intention was at the time? The only possible ground on which the complaint can be urged by the defendant is, that moneys were applied in a way different from that directed by the statute. The act makes the call a debt due from the subscriber to the company, and it limits the answer to be given to that claim of debt;—if he has not paid the sum which is so called for, "the company shall be entitled to recover what shall appear due on such calls, unless it shall appear that the principal moneys previously paid on any such share, together with such call, exceed the sum of 50*l*." If we were to grant the pleas which are sought to be used as defences to the action, we should be repealing those directions of the 148th section of the statute, which enact that the money shall be recoverable upon certain proof being given by the plaintiffs. This being a debt created by act of parliament, it is clear it was never intended that, in calling on a Court to decide whether a sum for the subscription is due or not, the parties should litigate matters which belong to another forum: if the subscribers are dissatisfied with the mode in which the money is applied, the proper place and time to dispute that, is when a general meeting is called;—they are there to express their disapprobation of the conduct of the directors. Or if the general meeting is at a great distance, and the question cannot be delayed, and there is a sufficient number of persons to dispute the propriety of the proceedings, they can call a special meeting, by giving twenty-one days' notice thereof. It seems to me it was never intended, nor ought it to be allowed, that

so general a question as that should be litigated in the question whether a call is due from an individual subscriber.

The next plea, on which it is contended the defendant has a right to rely, puts the last question in a more tangible and close compass; for it states that there has been a deviation from the original line, and that the money is called for in respect of such deviation.

The effect of allowing such an answer as this would be, that if there is any deviation to the extent of three yards, with the consent of the person whose land immediately adjoins, and at the wish of the directors and of the company generally, every individual subscriber, from the moment that deviation is made, may stay his hand and refuse his call, and the whole concern be broken up altogether. Such a proposition cannot for a moment be sustained.

The last plea which is sought to be placed on this record, is, that at the time the calls were made there were not 36,000 shares in the company. Let us just see on what that stands. The 136th section of the act enacts, "That notwithstanding anything in the several subscription deeds or contracts relating to the said several lines, the capital of the company hereby incorporated shall be 1,800,000*l.* divided into 36,000 shares." I cannot see how it is possible to say there are not 36,000 shares; there may not be 36,000 called into action on which the subscriptions are sent in and the money forthcoming: but if there is the capital of 1,800,000*l.*, the act says it is divided, and there are the 36,000 shares, if not in fact, yet in contemplation of law. It seems to me, therefore, that it is not an available plea. All the pleas suggested seem to me rather calculated to raise difficulties than to put forward any just ground of defence. And there is this observation to be made, that if the learned counsel who framed these pleas feel extremely confident that the pleas are tenable, they may plead them without coming to us, where they intend to rely on them.

BOSANQUET, J. I am also of opinion that the pleas which have been the subject of discussion to-day ought not to be pleaded together with the pleas of never indebted, and that the defendant was not a proprietor. The pleas which are sought to be pleaded in addition to these are, that "due notice of the calls was not given," and "that the calls were made for other purposes than those authorized by the act;" one of the pleas stating it generally, the other specifically, for the purpose of carrying on the railroad after a deviation had been made.

Besides those, there is another plea asked for, "That 36,000 shares were not in the company at the time the call was made." It appears to me that these pleas ought not to be pleaded, and that in truth they are not pleadable under the act of parliament, for the statute says, "It shall be sufficient for the said company to declare and allege that the defendant, being the proprietor of a share, or so many shares (as the case may be) in the said undertaking, is indebted to the said company in such a sum of money as the call or calls in arrear shall amount to, for a call or so many calls of such sum or sums of money upon a share, or so many shares belonging to the said defendant, whereby an action hath accrued to the said company by virtue of this act, without setting forth the special matter." It dispenses with the plaintiff setting out special matter in the declaration, but it goes on to state what he shall prove at the trial. "And on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such

respective calls, was a proprietor of such share or shares in the said undertaking as such action is brought in respect of, or some one such share, and that such notice was given as is directed by the act of such call or calls having been made, without proving the appointment of the directors or any other matter whatsoever: and the said company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, on such call or calls, unless it shall appear that the principal moneys previously paid on any such share, together with such call, exceed the sum of 50*l.* on each share of that amount, or that any such call exceeds 10*l.*” It cannot be necessary, therefore, as it appears to me, to put any issue on the record, stating that notice has not been given, as that proof is directed to be given by the plaintiff at the trial.

The next question is, whether either of the other pleas is pleadable, namely, that the whole number of shares has not been created, and that there has been a deviation from the line of the railway.

It certainly appears to me that the act of parliament itself, after reciting what had taken place as to this distinct line of railway, has created the 36,000 shares, and that they are in the company. If any of them, having been appropriated under this act, have been rejected by the individuals to whom they have been appropriated, such shares remain in the company: but the plea is, that 36,000 shares were not in the company at the time the call was made. Independently of that, under sect. 148 it is not competent to the defendant, when the proof required by the statute has been given on the part of the plaintiffs, to set up such a defence. And the same observation applies more strongly to the other objection, that the calls are made for the purpose of carrying on the railway after a deviation has been made in it. It is not even alleged in the plea that it is made for the specific purpose of paying the expenses of any deviation: It may be that that expense was paid from other sources than from calls: but, independently of that, it appears to me that it is not competent for the defendant to set up that defence. The consequence would be, that if this company, which is established for certain purposes described in the act of parliament, should do any one thing illegal, which has cost money, and a call should afterwards be made, the defendant might set up as a defence that such call has been made for the purpose of paying the expense of such illegal act. It therefore appears to me, that these are pleas which the defendant should not be allowed to plead with the two others allowed by the judge.

MAULE, J. I am also of opinion that the defendant should not be permitted to plead the third plea together with the others which have been allowed. He ought either to plead that alone, or it should be struck out:—and I think that the additional pleas which the defendant seeks to put upon the record should be disallowed.

It is not absolutely necessary to determine whether the pleas are good or bad. If the pleas are bad, that is a reason why they should not be allowed under the statute of Anne. But we are not depriving the party of the opportunity of reviewing our decision in point of law, for he may plead any one of these pleas, and so raise the question on the record.

I am of opinion, however, that the pleas are unnecessary, inasmuch as they are involved in the *nil debet*, or are clearly bad pleas, and of a description which the Railway Act intended to exclude; because, if

they were not excluded, there would be so many impediments in the way of making calls that no such undertaking could be carried effectually into execution. The statute in express terms says that, on proving certain things, the plaintiff shall recover, unless such other things shall happen. Now, the plea to which I am at present adverting, admits such matters as the plaintiff is required to prove, and does not set up any of those matters in the absence of which the statute says the plaintiff shall be entitled to recover.

The pleas appear to me to be clearly bad, both as against the policy of the act and against its express terms, and, consequently, ought not to be allowed.

Rule discharged.

GOULD against WHITEHEAD.—p. 144.

Plaintiff undertook not to sign judgment until after a further demand of plea: defendant, without waiting for such demand, pleaded several pleas without leave of the Court: Held, that plaintiff was justified in signing judgment for the irregularity.

THE defendant being sued as endorser of a bill of exchange, his attorney, on the 28th of June last, told the plaintiff's attorney that the endorsement was a forgery, and recommended him to discontinue.

The plaintiff's attorney requested time to inquire into the matter, and gave an undertaking not to sign judgment until after a four days' further demand of plea.

Without receiving any such demand, the defendant's attorney, on the 2d of November, pleaded two pleas without leave of the Court, and on the 9th, ruled the plaintiff to reply.

On the 13th the plaintiff signed judgment, which

Henderson obtained a rule nisi to set aside.

Fitzherbert showed cause. The judgment is regular, the defendant having pleaded double, without leave of the Court. And there was no breach of good faith,—the ground on which the defendant will now rely,—because when the defendant put in the pleas without demand, the plaintiff was absolved from his undertaking to make a further demand, and was compelled to sign judgment or admit the pleas. Besides, the motion, though in form a motion to set aside the judgment generally, is in effect a motion to set it aside for irregularity, and after obtaining the rule nisi on that ground, the defendant cannot now rely on the alleged breach of good faith: *Smith v. Clark*, 2 Dowl. 218; *Harvey v. Bennett*, 2 Chitty's Rep. 238, (18 E. C. L. R. 319.)

Henderson relied on the breach of good faith.

TINDAL, C. J. The judgment here is regular, for the defendant has put in two pleas without a rule to plead double. Then, has it been signed in breach of good faith? The plaintiff undertook not to sign judgment till after a further demand of plea; but the defendant, without any demand, puts in two pleas spontaneously and rules the plaintiff to reply. What was the plaintiff to do? If he did not sign the judgment, judgment might be signed against him: the defendant could not be permitted to allege that his own rule to reply was bad; and therefore, this rule must be discharged with costs.

The rest of the Court concurring, the rule was discharged, but the defendant was afterwards allowed to set aside the judgment on payment of costs.

Rule accordingly.

EDWARDS against The Bishop of **EXETER**, and **TODD**, Clerk.—
p. 146.

A bishop, defendant in *quare impedit*, who fails upon demurrer, may be exempted from costs by certificate of the Court, under 4 & 5 W. 4, c. 39.

JUDGMENT having been given upon demurrer, for the plaintiff in this *quare impedit*, see ante, vol. v. p. 652, the Court certified that the defendants had probable cause for defending the action, pursuant to 4 & 5 W. 4, c. 39, which gives costs in *quare impedit*, but provides "that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or if there shall be no trial by a jury, the Court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent had probable cause for defending such action."

Manning obtained a rule *nisi* to discharge this certificate, on affidavits which imputed to the bishop that he was aware of the validity of the plaintiff's claim, but raised objections in order to occasion delay, and thereby acquire a title to present, as he ultimately did, by lapse. Although he was not bound to do so, he might, if he pleased, have inducted upon the presentation of one of two joint patrons, and so have avoided the necessity for this action: the certificate therefore ought not, in the exercise of a fair discretion, to have been granted. And a judgment on demurrer was not within 4 & 5 W. 4, c. 39. By the previous statute 3 & 4 W. 4, c. 42, s. 34, it was enacted that where judgment shall be given, either for or against a plaintiff or defendant upon *any* demurrer, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf. The proviso in 4 & 5 W. 4, c. 39, was merely an exception to the enacting clause of 4 & 5 W. 4, c. 39, which gives costs only upon verdict, nonsuit, or discontinuance, and did not repeal or affect the preceding enactment in 3 & 4 W. 4, c. 42, s. 34, as to costs upon demurrer.

A rule *nisi* having been granted,

Kelly and *Butt*, who showed cause, contended that the two acts were in *pari materia*, and that the proviso in the later statute must be read as a qualification of the general enactment in the earlier. With respect to the merits, they produced affidavits which showed that the defendants had at least a colourable ground for defending the action.

Manning, in support of the rule, argued that if the two statutes were to be expounded as in *pari materia*, the proviso, as a qualification of a remedial act, must be construed strictly; and if so, applied only to cases where, according to the enacting clause of the act in which it was inserted, there had been a trial by jury, and where the bishop defended as special disturber in the character of patron, not where, as in the present instance, he collated by lapse.

As to the merits, the bishop had been unnecessarily fishing in troubled waters, and must take the consequence.

TINDAL, C. J. I think this rule must be discharged. The earlier statute 3 & 4 W. 4, c. 42, gives costs to the successful party upon a judgment on demurrer, in *all* actions: it is clear therefore that *quare impedit* is included: then comes the statute 4 & 5 W. 4, c. 39, which, in the enacting part, gives the plaintiff in *quare impedit* his costs where he succeeds upon verdict, and the defendant upon a nonsuit or discontinuance; provided "that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or if there shall be no trial by a jury, the Court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent, had probable cause for defending such action."

The question is, whether this proviso extends to the former statute and judgments on demurrer, or is limited to cases of verdict for the plaintiff. What is there so to limit it? the terms of the proviso are sufficiently large to comprehend judgment on demurrer, and no reason can be assigned for the restriction proposed: it is as just that the bishop should receive the protection of the Court on demurrer as on verdict; and if so, why should not the clause be interpreted as in other cases, where there are several statutes in *pari materia*?

Then, as to the question whether the bishop had probable cause for defending the action, in a case which we took time to consider, it might be permitted to the bishop to doubt.

BOSANQUET, J. I am also of opinion that the two statutes must be construed together: the first applies to cases of demurrer; the second to verdicts, nonsuits, and discontinuances, without referring to demurrers, they being already provided for; and then comes the proviso which exempts the bishop from costs, where he had probable cause for defending the action, and which is intended to apply as well to cases of demurrer under the first act, as to cases of verdict under the second.

I think this is a case in which the bishop is in the situation of an ecclesiastical patron, and, considering the host of authorities to which we were referred on the argument, that he had probable cause for defending the action.

ERSKINE, J. Admitting that the first statute applies to actions of *quare impedit*, which I think it does, the question is narrowed to the meaning of the proviso in the second. As the enacting part of that statute applies to cases of verdict, and the proviso to cases of verdict and something more, it is necessary to extend its construction beyond the act itself, and then it naturally embraces the case of demurrer in the former act, which is in *pari materia*.

Then, I think the bishop had probable cause for defending the action, which he did, not on the ground that he had himself collated another incumbent, but on account of difficulties as to the title of the plaintiff.

MAULE, J. The statute 3 & 4 W. 4, c. 42, s. 34, which gives costs on demurrer, applies as well to *quare impedit* as to other actions: the 4 & 5 W. 4, c. 39, which gives costs in *quare impedit*, applies in the first instance to verdict, nonsuit, and discontinuance: then comes the proviso, that no costs shall be had against the bishop, if the judge who tried the cause, or if *there shall be no trial by jury, the court in which judgment shall be given*, shall certify that the bishop had probable cause for defend-

ing the action. It is contended that the proviso is only an exception out of the enacting clause, and therefore applies to cases of verdict only: but the words "if there shall be no trial by jury," &c., would not have complete operation unless they applied to the case where judgment was given for the plaintiff on demurrer.

With respect to the question of probable cause, we ought not to look to the affidavits, but confine ourselves to the record. Whether the bishop claiming by lapse is to be held an ecclesiastical patron within the meaning of the act, although I concur with the Court, I do not feel quite so clear.

Rule discharged.

The QUEEN against The Sheriff of ESSEX, in a cause of DORRIEN and Others against SHERIDAN.—p. 150.

On the 3d of August the sheriff levied under a *fi. fa.*: on the 4th of September he was ruled to return the writ in eight days; before the 13th, defendant died: the writ was not returned November 1st: it not appearing that plaintiff had lost any thing by the delay of the return, the Court set aside an attachment against the sheriff on payment of costs.

On the 2d of August last a *testatum fi. fa.* to levy 148*l.* 10*s.*, was issued, directed to the sheriff of Essex. On the 3d, the under-sheriff's deputy bailiff made a levy to the amount of 44*l.* 5*s.* 6*d.* net.

On the 4th of September, a judge's order was obtained, requiring the sheriff to return the writ in eight days.

The defendant died between the levy and the 13th of September, when the sheriff's return ought to have been made.

The return was made on the 1st of November. And

On the 6th of November the plaintiff issued a writ of attachment against the sheriff, for not returning the writ in due time, alleging, that if the writ had been returned on or before the 13th of September, the plaintiff would have been able to have levied the balance of the debt and costs.

Bompas, Serjt., on the part of the bailiff of the sheriff, obtained a rule nisi to set aside the attachment. There was an affidavit that the deputy under-sheriff, upon being called on to return the writ, had written to the deputy bailiff, but had not been furnished with an answer till the 1st of November.

Wilde, Serjt., showed cause. The affidavit discloses no excuse, and the sheriff is clearly in contempt; the attachment, therefore, can only be set aside on such terms as shall make up for the loss the plaintiff has sustained by the sheriff's neglect. If the return had been made on the 13th of September, the plaintiff would have been apprized of the defendant's death, and might have issued an *alias testatum fi. fa.*, under which he might have recovered the rest of his debt. It will be objected here, that the defendant died before the day by which the sheriff was bound to return the writ; that under 3 & 4 W. 4, c. 67, a *testatum* cannot bear date till the day of the return of the preceding writ; and that, therefore, the delay of the return has occasioned no loss to the plaintiff: that objection, however, applies only to writs on mesne process, and not to executions. *Watson v. Mascali*, 4 M. & Scott, 461, (30 E. C. L. R. 355;) *Storr v. Bowles*, 1 Dowl. 516; *Sutton v. Lord*

Cardross, 1 Dowl. 511. In *Brocher v. Pond*, 2 Dowl. 472, PARKE, J., said "the act of parliament says, 'all writs of execution *may* be tested on the day on which the same are issued.' It does not say they *must* be tested on that day; nor does it say how long before they may be tested. The execution creditor has, therefore, a right to avail himself of his common law right."

Bompas, Serjt. The sheriff was not bound to make the return earlier than the 13th of September, and then, the defendant being dead, the plaintiff could not have issued a new writ which would have bound the defendant's goods. In all cases of continuance the subsequent writ must bear date the day the preceding writ is returnable: where goods are levied the first writ must be recited in the second. *Watson v. Muscall* only decided that the defendant was wrong in applying to set aside the *fi. fa.* where the error was in the judgment; and the question raised in *Brocher v. Pond* had no bearing on the present case. At all events the plaintiff had not shown that any further goods of the defendant had been discovered, or that, in fact, he had sustained any injury. The sheriff, therefore, ought not to be fixed.

Cur. adv. vul.

TINDAL, C. J. This was a rule for an attachment against the sheriff for not returning a writ of *testatum fi. fa.* The writ was issued on the 2d of August, and a levy of part of the debt was made on the 3d. On the 4th of September, a judge's order was obtained for a return of the writ in eight days; and before the 13th the defendant died: the writ was not returned till the 1st of November: the sheriff, therefore, is clearly in contempt; and the question is, on what terms the attachment should be set aside. On behalf of the plaintiff it is urged that he has lost the opportunity of levying the rest of his debt. If we could clearly see that, the attachment should be allowed to stand as a security: but we are not satisfied that any new writ could have issued with effect; and, at all events, as the old writ was not returned till the 1st November, there was nothing to prevent the plaintiff, if he heard of any more goods, from going on with his execution under the old writ. The rule, therefore, must be absolute to set aside the attachment on payment of costs.

Rule absolute accordingly.

BROWN against HUDSON.—p. 152.

In the Common Pleas, it is not necessary that defendant's addition should be endorsed on a writ of *ca. sa.*

A RULE *nisi* having been obtained to set aside a *capias ad satisfaciendum* in this case, on the ground that the defendant's addition had not been endorsed,

Talfourd, Serjt., who showed cause, objected that the rule of Hil. 2 & 3 G. 4, 5 B. & Ald. 560, which requires the insertion of the defendant's addition, prevails only in the Court of Queen's Bench, and not in the Common Pleas or Exchequer. He alleged that the plaintiff had been unable to discover the defendant's trade. In *Davidson v. Dunne* 4 Dowl. 119, the Court refused to discharge a defendant out of custody for want of the endorsement on a *testatum ca. sa.*

Bompas, Serjt., in support of the rule. In *Davidson v. Dunne*, the application was not, as here, to set aside the writ, but to discharge the defendant out of custody, which was wrong in point of form. The Court did not say that the rule prevailed only in the Court of King's Bench.

TINDAL, C. J. The attention of the Court was not called to the point. The practice is confined to the Court of Queen's Bench.

Rule discharged.

BALMANNO against THOMPSON.—p. 153.

The Court set aside, without an affidavit of its falsehood, a rambling sham plea, which offered several answers to the action without leave to plead several matters.

To the first count of a declaration which stated that the defendant, on the 9th of February, 1839, made his bill of exchange directed to John Hands, and required John Hands to pay to the defendant's order 17*l.* 10*s.* 6*d.*, four months after date, with an averment of nonpayment by Hands, and notice thereof to the defendant,

The defendant pleaded that the said bill of exchange in the first count mentioned was, to wit, on, &c., made and drawn as in that count mentioned by a certain person to the defendant unknown, who then wrote at the bottom of the said bill, the initials of the Christian name, and also the surname of the defendant, without the license or authority of the defendant; which was the supposed making of the said bill of exchange by the defendant as in the first count mentioned:—that the same was so made and drawn long after the day and time appointed by the commissioners of stamps, for using the die and dies now in use for stamping bills of exchange, to wit, on, &c., in the first count mentioned; and that the said bill of exchange was and is stamped with the old die which the said commissioners had then discontinued the use of, contrary to the form of the statute in such case made and provided:—that the said bill of exchange was made and drawn for the accommodation, and at the request of the said John Hands, and that the same was endorsed to the plaintiff as in the first count mentioned by a certain person to the defendant unknown, writing the initials of the Christian name and the surname of the defendant at the back of the said bill, without the license or authority of the defendant, and for the accommodation of the plaintiff; which was the said supposed endorsement by the defendant, in the first count mentioned:—nor did the defendant ever receive any value or consideration whatsoever for the said supposed drawing or endorsement of the said bill of exchange, or the payment of the amount, or of any part thereof:—and the said endorsement was made to the plaintiffs after the said bill had become due, and without any value or consideration whatever:—that the said bill of exchange was not presented to the said J. Hands for payment:—nor did the defendant have due notice of the nonpayment thereof by the said J. Hands.

The plea having been set aside by order of a judge at chambers:

A rule *nisi* was obtained to discharge that order.

Peacock showed cause. The plea is, on the face of it, an abuse of the process of the Court; it contains in effect seven distinct answers to the action, which have been pleaded without leave to plead several

matters, and, therefore, the Court has authority to strike it out. *Blewitt v. Marsden*, 10 East, 237; *Smith v. Hardy*, 8 Bingh. 435, (21 E. C. L. R. 340;); *Dawson v. McDonald*, 2 Mees. & W. 26; *Knowles v. Burward*, 2 Per. & D. 235. In *Horner v. Keppel*, 2 Per. & D. 234, though the Court refused to strike out the particular plea, they asserted their general jurisdiction.

Bompas, Serjt., in support of the rule, admitted that a plea which was manifestly a nullity might be struck out, but contended that this could only be done on an affidavit of its falsehood; and that there was no authority for setting aside a single plea, on the ground that it amounted to several pleas pleaded without leave of the Court. [TINDAL, C. J. There was no affidavit in *Blewitt v. Marsden*.] But in the subsequent cases of *Richley v. Proone*, 2 Dowl. & R. 661; *Miley v. Walls*, 1 Dowl. 648; *La Forest v. Langon*, 4 Dowl. 642; and *Lewis v. Kerr*, 5 Dowl. 327, there was such an affidavit; and in *Cooper v. Jones*, 4 Dowl. 591, it was said the Court never interfered, unless the defendant was under terms of pleading issuably. [BOSANQUET, J. In *Horner v. Keppel*, PATTESON, J., said he was wrong in *Cooper v. Jones*.] In *Horner v. Keppel* the Court refused to set aside the plea, though it was open to as many objections as the present. The plea contains *some* answer to the declaration, and the defendant ought not to be deprived of his writ of error.

TINDAL, C. J. I am of opinion that this rule ought to be discharged, and that the order for striking out the plea must stand good.

It is perfectly clear that the Court has power to strike out a plea which is an abuse of the process of the Court, and where the Court cannot but see that the intention of the party pleading it is to perplex and confound instead of entering into a proper defence. Here so many issues are offered in fact and law that it would be impossible to make a satisfactory reply to the plea, and under such circumstances the Court has exercised the power of setting it aside, as in *Blewitt v. Marsden*, and other cases.

The Court might decline doing this where it was a measuring cast as to the sufficiency of the plea in law; but where the plea is so clearly bad, and the manifest object is to delay and perplex, it ought not to be allowed to remain on the record.

BOSANQUET, J. I am of the same opinion. This plea is a mockery of the Court, and an insult to its proceedings; and where it is so clear that the process of the Court has been abused, the plea should be set aside.

Besides its other numerous defects, this plea is also an attempt to evade the rule of Court which permits judgments to be signed where a party pleads several matters without leave of the Court.

MAULE, J. In discharging this rule the Court goes no further than it has done before in setting aside pleas manifestly bad in law. It is said that the plea contains *some* answer to the declaration, and that the defendant ought not to be deprived of his writ of error. If the plea really raised a question of law, the Court would not set it aside; but it would be mischievous if they could not exercise a discretion where pleas of this description are pleaded in vacation, and the time for argument is not at hand.

Rule discharged, with costs.

COLTMAN, J., was absent

BROOK against GUNNING.—p. 157.

For the purpose of taking out of court money paid in in lieu of bail, a render of defendant is equivalent to appearance.

THE defendant having been served with a writ of summons, and arrested on a *capias* endorsed for bail for 23*l.*, at the suit of the plaintiff, on the first of November last, deposited the 23*l.* and 10*l.*, with the proper officer under 43 G. 3, c. 46, s. 2, and was thereupon liberated:

On the 8th he put in special bail, one of whom was excepted to on the 13th; but on that day the defendant rendered himself: upon which,

Thomas obtained a rule *nisi* to cause the 23*l.* and 10*l.* to be paid out of Court to the defendant.

Currington, who showed cause, objected that the defendant had not entered a common appearance as required in such case by the endorsement of the writ, (2 W. 4, c. 39, schedule,) and therefore was precluded from making this application.

The render was too late; and after putting in bail the defendant should have proceeded to perfect them.

Thomas. According to the statute the plaintiff might have entered an appearance himself; but the putting in bail was equivalent to appearance, so that the defendant was in court on the 8th: and the rendering himself placed the defendant in court more effectually even than putting in bail, for the purpose of the present application; *Chadwick v. Buttye*, 3 M. & Selw. 283; *Harford v. Harris*, 4 Taunt. 669; *Gould v. Berry*, 1 Chitty's Rep. 143; the defendant had four days after the 13th, during which he might have rendered; he would have been in time to justify till the 17th.

TINDAL, C. J. The question is, whether what was done was equivalent to appearance. *Harford v. Harris* goes the whole length of establishing that it was, and therefore the rule must be

Absolute.

In the Matter of HARE, MILNE, and HASWELL.—p. 158.

A. and **B.**, partners, referred to arbitration all matters in difference between them and **C.**; and if either of the parties should die before the award was made, it was to be delivered to his personal representatives, or such of them as should desire the same: pending the arbitration **B.** died: several meetings were held after his death, and **C.** then protested against the arbitrator's proceeding, unless the executor of **B.** were made a party: an award having been made in favour of **A.** without **B.**'s executor having been made a party, the Court refused on that ground to set the award aside.

A RULE was obtained in this case on the part of *Hare*, calling on *Milne* to show cause why the award made between the parties should not be set aside, on two grounds: first, that *Mackillop*, one of the arbitrators, had drawn cases, and taken the opinion of barristers, and used them in the reference, without the previous knowledge or sanction of the two other arbitrators, and altogether without the concurrence of *Hare*, the statements in which were objected to by *Mr. Turnbull*, one of the arbitrators; secondly, that the reference proceeded, and the award was made after the death of *George Haswell*, one of the parties to the arbitration, and without his personal representative being made part-

to or having notice of the proceedings, and against the objection and protest of Hare.

It appeared from the condition of the bond of arbitration, and the affidavits which were filed, that Milne and Haswell were merchants in Batavia, the partner Milne residing in London and conducting the partnership business there, and Haswell in Batavia; that Hare was a merchant in London, having had large dealings with Milne and Haswell; and that in the course of such business disputes arose respecting certain mercantile transactions; whereupon all matters in difference were referred to Campbell, an arbitrator appointed by Milne, to Turnbull, an arbitrator appointed by Hare, and to Mackillop, a third person nominated by the two, before they entered upon their arbitration. The arbitration proceeded, being conducted by Milne, the resident partner in England, on behalf of himself and Haswell, and by Hare on his own account, there being an express clause in the submission that no legal person should be brought before the arbitrators; and the award was made in favour of Milne, and signed by two only out of three arbitrators, viz. Campbell and Mackillop.

The submission bore date the 3d of August, 1837, and contained a provision, that in case of the death of either party before the making of the award, the award should be delivered to the personal representatives of the party dying, or such of them as should desire the same. Haswell died the 3d of July, 1838. On the 3d of November following, Hare protested against the arbitrators' proceeding, unless the executors of Haswell were made a party; but several meetings had been holden by the arbitrators between the 3d of July and the 3d of November: the award was published in March, 1839.

Kelly and Martin, who, in Trinity term, showed cause against the rule, answered the first objection by an affidavit from Mackillop, which stated, that he had made up his opinion on the point in dispute before the opinion of counsel was taken by him; and that such opinion was taken for no other purpose than to guide his determination whether he should accede or not to the request of Turnbull, that the facts relating to the disputed points should be set out on the award; having intended, in case such opinion differed from his own, to accede to the request of Turnbull, and to state the facts in the award; that it was not until that period that he read the cases and opinions mentioned in Turnbull's affidavit, and that the cases produced by him were not stated inaccurately, nor did they contain irrelevant matter introduced in a manner calculated to mislead counsel, or to produce an opinion by which the arbitrators could be rightly governed; but that on the contrary they contained a fair and true statement of the circumstances. And again, it appeared from the affidavit of Campbell, that his judgment was formed and delivered before either of the said cases or opinions were read by Mackillop, or read or seen by himself.

With respect to the second objection, they contended that it was too late for Hare to start that objection on the 3d of November, when several meetings had taken place since the death of Haswell. In *Hewlett v. Laycock*, 2 Car. & P. 574, (12 E. C. L. R. 271,) it was held, that where a cause was referred to arbitration, the mode of conducting it must be left to the arbitrators; and if they, after the first or second meeting, should exclude both the parties, and their attorneys, and examine witnesses privately, at their (the witnesses') houses, such conduct was no

good ground of objection, provided it did not proceed from corrupt motives; at all events, if either party should take advantage of it, he must give notice, at the time, that he intended to rely on it as an objection; and if he should lie by and suffer other meetings to take place, and when the arbitrators were ready to make their award, revoked his submission, he was liable to an action at the suit of the other party desirous of having the benefit of the award. But here, according to the terms of the submission, the death of one of the parties was not to abate the proceedings, for the award was, in such case, to be delivered to his executor; it was clear that the death of one of the parties in such a case did not revoke the submission; *Dowse v. Coxe*, 3 Bingh. 20, (11 E. C. L. R. 12;) and there was no reason for making the executor a party, since an award that he should pay, made after the death of the testator, would not bind the executor. *Edmunds v. Cox*, 2 Chitty's Rep. 432, (18 E. C. L. R. 390.) The award could only be made against the survivor. Here, as it was made in his favour, no difficulty could arise on the question of performance.

Wilde, Serjeant, and *R. V. Richards*, in support of the rule, referred to *Walker v. Frobisher*, 6 Ves. 70, where Lord ELDON reprobated the practice of arbitrators making affidavits that they are not influenced by what they may have heard *ex parte*.

Upon the second objection, they contended that Hare might require the executor of Haswell to appear, at any time before the award was published, and that *Hewlett v. Laycock* must be incorrectly reported. It might be true that an award after the death of a testator, directing payment by an executor, might not bind him; but where, by the terms of the bond of submission, the award, in case of death, was to be delivered to the executor, the executor had a right to come in, and proceedings carried on in his absence were liable to be set aside.

Cur. adv. vult.

TINDAL, C. J.,—after stating the facts as ante, p. 327.—The first objection made against the award, as it was argued before us, was, in substance, that Mackillop took the opinion of counsel upon an incorrect state of facts, against the consent of Hare, and acted upon such opinion. And if this objection had remained unanswered in point of fact, we should have thought the award impeachable upon ground so clear and manifest, that it is sufficient barely to state the proposition. But we think this objection satisfactorily removed by the statements in the affidavits in support of the award. The affidavit of Mr. Mackillop denies the statements of Mr. Turnbull's affidavit in several important points, and states in distinct terms, that he had made up his own opinion on the point in dispute before the opinion of counsel was taken by him: and that such opinion was taken for no other purpose than to guide his determination whether he should accede or not to the request of Mr. Turnbull, that the facts relating to the disputed points should be set out on the award; having intended, in case such opinion differed from his own, to accede to the request of Mr. Turnbull, and to state the facts on the award. And he further states that it was not until that period that he read the cases and opinions mentioned in Mr. Turnbull's affidavit, and that the cases produced by him were not stated inaccurately, nor did they contain irrelevant matter, introduced in a manner calculated to mislead counsel, or to produce an opinion by which the arbitrator could be rightly governed; but that,

on the contrary, they contained a fair and true statement of the circumstances. And again, it appears from the affidavit of Mr. Campbell, that his judgment was formed and delivered before either of the said cases or opinions were read by Mackillop, or read or seen by himself. With such contradiction as to part of the facts, and such explanation as to others, we do not feel ourselves warranted in yielding to the first ground of objection to the award.

As to the second objection, it appears that Haswell died in July, before the award was made, and that after his death several meetings took place before the arbitrators, but that subsequently, and before the award was made, Hare protested against the further proceedings under the submission, without the appearance of the personal representative of Haswell. There is in the bond of submission a provision, that in case of the death of either party before the making of the award, then the award shall be delivered to their personal representatives, or such of them as should desire the same. And as a general proposition of law, it is extremely questionable whether the death of one of the parties on one side avoids an award. (See the cases referred to in *Watson on Awards*, p. 27.) We therefore think we should not be justified in setting the award aside, upon motion, on this objection. If, upon moving to enforce it by attachment, it could be made to appear to us, that the party called upon to perform the award incurred any danger or lost any benefit, by reason of the personal representative of the deceased partner not having been brought before the arbitrators, in such case, terms and conditions might be imposed calculated to remove such danger or inconvenience; or the party might be left to his remedy by action on the award. But in the case before us, where the award is made in favour of the surviving partner, we see no possible difficulty on that ground. So that, at all events, the objection appears to us not sufficient for setting aside the award.

We therefore think the rule must be

Discharged.

ADAMS against BUSH and Others.—p. 164.

Testator having three different estates, left one to G. A. for life, remainder to G. A.'s first son for life, and then to the issue of such first son in strict settlement: remainder in like manner to G. A.'s second and other sons, and their issue: the second estate to G. A. for life, and to his child or children other than and except an eldest or only son, in fee; the third, to E. L. for life, and her children in strict settlement.

At the time of testator's death, plaintiff was the second son of G. A.: at the death of G. A. he was the only child, the first son having died in the interval: Held, that plaintiff was entitled, on the death of G. A., to take the second estate in fee.

THE following case was sent by the Master of the Rolls for the opinion of this Court.

Alexander Adams being seised of lands, &c., in Stanton Drew, and of a share in the manor of Timsbury and lands thereunto belonging devised the lands in Stanton Drew to trustees to the use of his wife for life; remainder to the use of his first and other sons in tail; remainder to the use of his daughters as tenants in common in tail; remainder to the use of his sister, Elizabeth Lloyd, for life; remainder to the use of her first and other sons in tail; remainder to the use of her daughters, as tenants in common in tail; remainder to the use of his uncle, George

Adams, for life; remainder to the use of George Alexander Adams, first son of George Adams, for life; remainder in strict settlement to the use of the issue of George Alexander Adams; remainder to the use of John Philip Adams, second son of George Adams, for life; remainder to the use of issue of John Philip Adams in strict settlement; remainder, in like manner, to the use of the third, fourth, fifth, sixth, and all other sons of George Adams and their issue; remainder to the use of the daughters of George Adams, as tenants in common in tail; remainder to the use of such persons as should become entitled to the proceeds of Norton Manor Farm, thereafter devised.

Of his share of the manor of Timsbury, subject to an annuity of 100*l.* to the widow of his father, the testator devised one moiety to trustees to the use of his uncle, George Adams, for life; remainder to the use of Elizabeth, the wife of George Adams, for life; remainder to the use of all and every the child and children of George Adams, other than and except an eldest or only son, and their heirs, executors, administrators, and assigns, forever; and if there should be but one such child, other than and except as aforesaid, to the use of such only child and his heirs; and if there should be no such child or children other than an elder or only son, or being such, all should die under the age of twenty-one, then to the use of such persons as should become entitled to the proceeds of the Norton Manor Farm, as above.

The other moiety was devised, in a similar manner, to the use of Robert Bush for life, (his wife was a cousin of the testator,) and to his children in succession.

Norton Manor Farm was devised in a similar manner to Elizabeth Lloyd for life, and her children in tail in succession, and in default of issue the estate was to be sold, and the money divided among the children of Robert Bush and George Adams, other than and except an elder or only son.

The testator, after bequeathing several large legacies, directed in manner following:—"That in case my personal estate be insufficient to pay my debts and legacies, then I charge my estates, lands, collieries, and other effects at or in Timsbury aforesaid, and given to my uncle, George Adams, and my friend, Robert Bush, with such deficiency, if any; and I direct the several legacies to be paid to the legatees within one year after my decease, by my executors hereafter named, out of my personal estate;" and he appointed his said uncle George Adams, and Robert Bush, joint executors of his will.

The testator died on the 2d of November, 1811, without issue.

The widow of the testator's father is long since dead.

Elizabeth Adams, the wife of the testator's uncle, George Adams, died in the lifetime of George Adams.

George Adams had issue three children only, George Alexander, his eldest son, who was born in the year 1801, the plaintiff, John Philip, who was born in the year 1802, and a daughter, Elizabeth Adams who was born in the year 1801.

Elizabeth Adams, the daughter of George Adams, died in December, 1806, in the lifetime of the testator and of her father, under age and without issue; George Alexander Adams was living at the death of the testator, and died in the year 1813, under age, and without issue, in the lifetime of his father.

George Adams, the uncle of the testator, died in April, 1819, leaving the plaintiff, John Philip Adams, his only child, him surviving.

The question for the opinion of the Court was, whether, under the will of the testator, the plaintiff, John Philip Adams, on his father's death, took any and what estate in the moiety of the premises and hereditaments at Timsbury.

The case was argued in Trinity term, by

Talfourd, Serjt., for the plaintiff. John Philip Adams took an estate in fee in the premises in question on the death of his father, the tenant for life. The remainder vested at the death of the testator, at which time the plaintiff answered the description in the will, for he was second son, there being an elder son alive : and unless an intention be plainly expressed to the contrary, a remainder vests at the death of the testator. Per BULLER, J., in *Doe v. Perryn*, 3 T. R. 484; *Doe v. Martin*, 4 T. R. 39; *Doe dem. Hunt v. Moore*, 14 East, 601. Therefore in *Driver v. Frank*, 3 M. & Selw. 25, a devise to the sons (except the first or eldest son) of Bacon Frank, who took an estate for life in the premises, and had no children at the date of the will, was held not a contingent remainder to such son as should be the second son of B. Frank, at the death of B. Frank, nor a vested remainder in the second or other son of B. Frank, liable to be divested by his becoming the first or eldest, by the death of his elder brother, in the lifetime of B. Frank, but a vested indefeasible remainder in the second or other son of B. Frank who should be born living an elder. That case, in substance, decides the present. The cases which look the other way are cases as to the disposition of personal property and executory devises. See *Stert v. Platel*, 5 New Cases, 439, (35 E. C. L. R. 165;); *Chadwick v. Doleman*, 2 Vern. 528; note to *Windham v. Graham*, 1 Russell, 331; *Matthews v. Paul*, 3 Swanst. 328.

R. V. Richards, for the defendant, did not dispute the general rule as to the vesting of remainders at the death of the testator, where no intention to the contrary can be collected from the face of the will; but contended that such an intention was plainly apparent here: for the testator had made dispositions as to three separate properties; the Drew Stanton estate; the Timsbury estate; and the Norton Manor Farm; and by those dispositions he had shown great anxiety to contrive that two of the properties should not be accumulated in the same hands: the construction insisted on for the plaintiff would have an immediate tendency to defeat that intention, and therefore the testator must have meant that the remainder in the plaintiff, if vested, should be divested upon his ceasing to answer the description of second son. In *Driver v. Frank*, the issue of the tenant for life was not born at the time of the death of the testatrix, and there was but one property to be disposed of.

Talfourd, in reply. The intention cannot be assumed; it must be expressed in words; *Lomax v. Holmden*, 1 Ves. 294; *Davies v. Lowndes*, 4 New Cases, 478, (33 E. C. L. R. 420;); and there are no words here to exclude the operation of the ordinary rule.

The following certificate was afterwards sent:—

We are of opinion that, under the will of the testator, John Philip Adams, on his father's death, took an estate in fee simple in possession in the moiety of the premises and hereditaments at Timsbury, defeasible in the event of his dying under the age of twenty-one.

N. C. TINDAL. T. ERSKINE. T. COLTMAN.

MORGAN and Another against MILLER and Another.—p. 168.

By an order of *Nisi Prius*, to which F. consented to become a party, a decree was to be obtained in Chancery, by consent, to refer a cause, and a Chancery suit between the same parties, to a master in Chancery: plaintiffs, trustees for F., having, in violation of their consent, frustrated the endeavour to obtain such a decree from the Court of Chancery, and having applied for a new trial in the cause, the Court granted the application for a new trial, but only on condition of plaintiffs paying the costs of the day and of the motion for a new trial, and of a motion for an attachment for not obeying the order of *Nisi Prius*.

By an order of *Nisi Prius* made in February, 1836, by consent, a verdict was entered in this cause for 10,000*l.*; but no execution was to issue till default should be made in payment of the sum to be awarded by a master in Chancery, to whom the cause and also a suit in Chancery between the same parties was to be referred; a Mrs. Farden consenting to become a party to the rule.

A rule *nisi* was afterwards obtained by the plaintiffs, to set aside the order of reference and proceed to a new trial; and by the defendants, for an attachment against the plaintiffs for not obeying the rule of reference.

Talfourd, Serjt., and *Kelly*, for the plaintiffs.

Wilde, Serjt. and *Burstow*, for the defendants.

The particulars of the case, and of what passed on these motions, which were discussed in Easter term, sufficiently appear in the judgment below, which the Court took time to consider.

TINDAL, C. J. This case comes before us upon two cross rules which have been obtained, one on the part of the plaintiffs, which calls on the defendants to show cause why the verdict found for the plaintiffs on the trial of this cause should not be set aside, and the order of reference made on such trial and the rule of Court thereon, should not be discharged, and why the plaintiffs should not be at liberty to proceed to the trial of this cause forthwith: the other, a rule obtained by the defendants, calling on the plaintiffs to show cause why a writ of attachment should not issue against the plaintiffs and against Mrs. Farden, who had become a party to the rule of reference, for not obeying the rule of reference.

The action out of which these proceedings originated, was an action upon a bond given by the defendants to the plaintiffs, to secure the payment of the sum of 5000*l.*, by instalments, with interest, of which there remained about the sum of 2000*l.* still due.

The defendants had been clerks of Mr. Whitton, a solicitor; and the sum secured by the bond was the consideration given upon their taking the business of Mr. Whitton on his death, calculated upon the profits expected to be made. The bond was given to the plaintiffs as trustees for the benefit of the widow and infant child of Mr. Whitton, according to the provisions of a settlement made for that purpose, on the widow marrying a second time one Mr. Farden, who was also a solicitor.

The defendants pleaded to the action on the bond, that it had been obtained by fraud and covin, upon which issue was joined. They had before filed a bill in Chancery, which was still pending at the time this action was brought, and which sought to set aside the transaction, or to obtain a deduction from the amount of the consideration paid for the business, on the ground that the *cestuy que trust*, Mrs. Farden, had not

acted consistently with her undertaking in regard to the business and the clients of the late Mr. Whitton. At the time of the trial Mrs. Farden had become for the second time a widow.

The cause having come on for trial before me at Guildhall, in February, 1836, and it appearing from the nature of the inquiry about to be entered into, a cause that might be more satisfactorily decided by an arbitrator than by a jury at Nisi Prius, an order of Nisi Prius was made, by consent, by which it was ordered that a verdict should be entered for 10,000*l.*, and the plaintiffs should be at liberty to enter up judgment thereon, but that no execution should issue, until default should be made in manner therein mentioned; that, with the consent of the parties, and also of Mrs. Farden, the widow, who consented to become a party to the rule, a decree or order of the Court of Chancery, in a cause of *Miller v. Morgan*, should forthwith be obtained, to refer it to one of the masters of that court to inquire, whether there ought to be any deduction from the amount of the principal and interest originally secured by the bond, in respect of the matters in dispute between the parties, and to state in what mode, and from what portion or interest of such fund, such deduction, if any, should be made and satisfied, and to inquire and certify by whom the costs of the issues in the cause and the Chancery suit should be paid; and it was also ordered, that on or before the 22d of March, 1836, the defendants should pay to the plaintiffs 150*l.* on account of interest on the bond, but that such payment should be without prejudice to either party in relation to the matters referred; that in case of default of payment of the sum ultimately awarded, execution might be issued immediately; that the judgment should stand as a security for future breaches, but that the verdict and judgment should not prejudice either of the parties as to the matters referred; and that this order might be made a rule of court; which was done accordingly.

It is scarcely necessary to notice an observation which appears to have been, on more than one occasion, pressed on the attention of the lord chancellor in the course of the proceedings which took place in his court, subsequently to the order of reference, namely, that the Court of Common Pleas was interfering with the jurisdiction of the Court of Chancery, and in a manner dictating to that Court what decree or order should be drawn up. It may be sufficient to observe, that the terms of the order of reference were the terms agreed upon between the counsel employed in the cause, and not in any manner the terms directed by the Court: in fact, the Court which tried the cause knew nothing whatever of the state of the proceedings in the Court of Chancery; it gave full credit to the learned counsel, that the agreement entered into was one which was founded on the state of the proceedings in that Court, and which, by the course and practice of the Court, might be entered into and carried into effect; and, in reality, did no more than lend the sanction of the common law court to enforce the agreement entered into between the parties. In consequence of this order, various proceedings have taken place in the Court of Chancery, both before the Vice-Chancellor and the Chancellor. The plaintiffs insist in their affidavits that they have been willing throughout, and have endeavoured to the utmost of their power, to carry into effect the arrangement which has been made by the order of Nisi Prius, so far as the rules of the Court of Chancery would allow. The defendants insist, on the other hand, that the plaintiffs have acted with bad faith

towards them, and have endeavoured at every step to defeat the arrangement.

It is impossible to come to a correct conclusion on this point, which is now the real question in issue between the parties, by the mere perusal of the affidavits, which are equally strong in assertion in favour of the conduct of the respective parties. We have, therefore, considered with attention the notes of the proceedings before the vice-chancellor and the lord chancellor, with which we have been furnished; and without recapitulating them on the present occasion, which would be altogether useless, the conclusion at which we have arrived is, that there has not been exhibited on the part of the plaintiffs a real and earnest endeavour to carry into effect the object and intention of the agreement entered into between the parties in this court; but, on the contrary, a determination on the part of the plaintiffs, on various occasions, to thwart the measures in the Court of Chancery which were necessary to give full operation to the plan suggested by the order of *Nisi Prius*. And we cannot, therefore, but attribute the failure of the completion of the agreement, to the wilful default on the part of the plaintiffs. Inasmuch, however, as the immediate ground upon which the former trial and the reference has become abortive, is, the not obtaining the aid of the Court of Chancery in the manner contemplated and expected on the order of reference; and as the fund sought to be recovered is one in which the plaintiffs are trustees only, and in which infants are interested, we think we should not be justified in refusing to the plaintiffs the liberty to try the cause; but at the same time, as we consider the ground of such failure attributable to the conduct of the plaintiffs and Mrs. Farden, in the progress of the proceedings in that court, we think the costs which have been uselessly incurred in this court ought to fall upon the plaintiffs and Mrs. Farden. Whilst, therefore, we make the rule obtained by the plaintiffs absolute, we do so upon the terms of payment of the costs of the day of the former trial by the plaintiffs, and payment by the plaintiffs and Mrs. Farden of the costs incurred by the defendants in the several motions made in this court. And with respect to the rule for the attachment, we direct the same to be enlarged and to stand over as a security for the payment of the costs before directed.

Judgment accordingly.

STAINES and Others, Assignees of BIRCH, a Bankrupt, against
WAINRIGHT.—p. 174.

Defendant, subject to the approval of a meeting of creditors, agreed to pay plaintiffs, assignees of B. a bankrupt, 2012*l.*, supposed to be equal to 10*s.* in the pound, upon all debts then proved; the fiat was to be worked in the usual way: a claim of defendant's of 700*l.* was to be allowed in full; the assignees to pay the costs of the bankruptcy; the surplus of the estate to be divided among the creditors; but the dividends of those who had previously received 10*s.* in the pound were to be paid over to defendant, and the excess beyond 10*s.* in the pound to belong to the creditors: Held, that this agreement was void, as contrary to the policy of the bankrupt law.

THIS action was brought by the assignees of one Birch, a bankrupt, to recover from the defendant the sum of 2012*l.* under an agreement made between the assignees and the defendant, and set forth in the declaration as a certain memorandum described therein as a memorandum to form the basis of an agreement: by that instrument, which was made subject to the approval of a meeting of the creditors, to be specially

called for that purpose according to the act of parliament in that behalf, the defendant agreed to pay the plaintiffs as assignees, within two months from thence, 2012*l.*, supposed to be equal to ten shillings in the pound upon all the debts then proved, and further to pay, or permit the assignees to retain, out of the estate, such further sum as should be equal to ten shillings in the pound upon debts not then known or ascertained, such last-mentioned amount to be limited to 500*l.*; but it was to be understood that the above amount did not include the debts of Mr. Birch, senior, and Mr. Birch, junior, amounting to about 1900*l.*, upon which, if provable, they would be entitled to their dividend upon the amount they should be allowed to prove: and it was provided, that if the defendant should obtain a discharge to the assignees, or a transfer to himself of any such debt so proved, he should be entitled to receive back or retain the amount which he should have paid on any such debt: it was agreed that the fiat should be worked in the usual way, and that the assignees should dispose of all the bankrupt's property, out of which the defendant's liens as thereby recognised were to be retained; that after satisfaction of the defendant's liens he should deliver up all securities in his hands, and that the defendant's claim of 500*l.* for a bonus, and 200*l.* for a certain lease, should be allowed in full, but that subject thereto his debt should be subject to examination and correction of an accountant; that the assignees should pay out of the estate the costs previous to and incident to the bankruptcy; and that after payment out of the estate of the full amount of the defendant's claims when ascertained, so far as the estate would extend, the surplus of the estate should be divided among the creditors, but the dividends of such as should previously have received ten shillings in the pound, should to that extent be paid over to the defendant in one week after the dividend should be declared; but that the excess beyond ten shillings in the pound should belong to the creditors, and that the terms of the agreement should be ratified by a deed.

It was averred in the declaration, that a meeting of the creditors was specially called for the purpose of approving of the agreement, according to the said act of parliament, and that at such meeting the said agreement was duly approved by the creditors, according to the said act of parliament:*

That from the time of the making the agreement, the plaintiffs had been ready and willing, as such assignees, to ratify the terms of the agreement by a proper deed, whereof the defendant, during all the time, had notice. Breach, that the defendant did not, within two months from the making the agreement, pay, nor had he yet paid the plaintiffs, being such assignee, the said sum of 2012*l.* or any part thereof.

Demurrer,—For that the consideration for the promise of the defendant in the declaration mentioned was void and illegal, as being contrary to the spirit and policy of the bankrupt laws; and also void and illegal inasmuch as the promise made by the plaintiffs, which was laid as the consideration of the defendant's promise, was not in their power to perform; nor could the defendant have enforced performance of the same, at all events without the express consent of all the creditors of Birch, whose debts were provable under the commission against him; that if such consent would support the promise made by the plaintiffs, yet that it was not with proper certainty, or in an issuable form averred in the declaration, that all the last-mentioned creditors did consent to the said agreement; but, on the contrary, the proper inference to be drawn from the averments in that respect was, that the agreement was approved of

only by the consent of the major part in value of the creditors who had proved under the commission and were present at the meeting; nor was it alleged with proper certainty, nor in an issuable form, that the creditors who were averred to have approved of the agreement did consent to or ratify the same; nor was it stated how they approved of the same; nor that they consented or ratified the same in any manner that would bind them to it by law; or that there was any consideration for their consent or ratification. Joinder.

Sir *F. Pollock* in support of the demurrer.

According to 6 G. 4, c. 16, no such agreement as that set forth in the declaration will bind the creditors, unless all the creditors assent: the eighty-eighth section only enacts, "that the assignees, with the consent of the major part in value of creditors, may compound with any debtor to the bankrupt's estate, and take any reasonable part of the debt in discharge of the whole, or may give time or take security for the payment of such debt, or may submit any dispute between such assignees and any persons concerning any matter relating to such bankrupt's estate, to the determination of arbitrators to be chosen by the assignees and the major part in value of such creditors, and the party with whom they shall have such dispute." And *Nerot v. Wallace*, 3 T. R. 17, decides that if an agreement be made with assignees, and they have no authority, it cannot be ratified. There was therefore no consideration of loss to the plaintiffs, or benefit to the defendants, on which the agreement can be supported. It was *nudum pactum*. And the agreement was not that the defendant should pay the 2012*l.*, but that a deed should be entered into, under which he should be bound to pay it; the only breach, therefore, that the plaintiffs could properly assign, would be, that the defendant had refused to execute the deed he promised by the agreement. But the agreement was altogether illegal, as contrary to the spirit of the bankrupt law.

Wilde, Serjt., contra.

The effect of the agreement is, that the defendant will insure the creditors 10*s.* in the pound, at least, upon condition of his being allowed, when the creditors receive that amount, to prove 20*s.* in the pound on his own debt, which, to the extent of 700*l.*, is not to be questioned; but, beyond that amount, is to be subject to the correction of an accountant.

The forbearance to dispute the defendant's claim to the extent of 700*l.*, and the agreement to refer the residue of it to the decision of an accountant, disclose ample consideration for the defendant's promise.

And though there is a stipulation that the agreement shall be ratified by a deed, that does not discharge the defendant from his liability on the agreement: an occupier who holds land under an agreement for lease, which specifies the stipulations to be contained in the future lease, is liable under the agreement for the breach of those stipulations, though the lease be never executed.

As to the plaintiffs not having the power to make this agreement for the creditors, if that were so, it would not follow that the agreement is illegal, for inability is one thing, illegality another; if overseers enter into an agreement for a parish which they cannot fulfil, they are still personally liable. (See *Lanchester v. Tricker*, 1 Bingh. 201.)

But the agreement is legal, and not inconsistent with the spirit of the bankrupt laws. It is averred that the creditors approved of the agreement according to the act of parliament; and if it were otherwise, issue should

have been taken on that allegation. In *Kaye v. Bolton*, 6 T. R. 134, where it was decided that a covenant to pay the creditors in full in consideration of their ceasing to prosecute the commission, was not illegal, the Court held that the words *the creditors* meant all the creditors. If the assignees do wrong they must account to the creditors; but if they have power to compound a debt, and to give a receipt for it, they have power to enter into an agreement such as the present. It is a mere mode of accounting, for it is expressly stipulated that the fiat shall be worked in the usual way. At all events, it does not lie in the defendant's mouth to object illegality; for he may satisfy the agreement by paying the money he has agreed to pay. In *Nerot v. Wallace*, the promise of the assignees to forbear to examine the bankrupt, was clearly illegal.

Sir *F. Pollock* in reply. This was the mere basis of an agreement, and not the agreement which was to bind the creditors; and without the consent of all the creditors, the agreement, even if reduced to a deed, would not have been binding.

Cur. adv. vult.

TINDAL, C. J., after stating the pleadings, as ante, p. 174, down to *—

As the act 6 G. 4, c. 16, s. 88, which gives validity to certain acts approved by the major part in value of the creditors present at a public meeting duly convened, does not extend to an agreement of the description above mentioned, no aid can be derived from the approval alleged; and the legal effect of the agreement must depend upon the provisions which it contains. After a careful consideration of these provisions, it appears to us to be clear that the defendant, as a consideration for the payment of the amount which he engages to pay, being 10s. in the pound upon all the debts proved, except those of Birch, sen., and Birch, jun., stipulates that he shall receive out of the estate, the full amount of 500*l.* called a bonus, and 200*l.* for a lease, in preference to all the other creditors except the two above specified, who are to prove and receive their dividends as if no agreement had been made, and who therefore are in no way affected by it; and further, that the whole of his debt, when ascertained, should be entitled to a similar preference. This agreement may possibly be very beneficial to the creditors; and the commencement of this action by the assignees against the defendant, affords reason to suppose that it has been so considered. But it professes to stipulate for an administration of the bankrupt's estate, which is at variance with the bankrupt laws; and as *all* the creditors are not bound by it, it could not be enforced by the defendant against the assignees of the estate, so as to give him the benefit which it is the object of the provisions on his part to receive. The assignees had no right to enter into a contract with a particular creditor that on a certain event he should receive out of the estate the full amount of any debt. It was their duty to make an equal distribution of the effects among the creditors, in proportion to all the debts of the bankrupt.

What the true meaning of that part of the agreement may be which relates to the defendant's liens being recognised thereby, it is unnecessary to consider; because we think, for the reasons above given, that the stipulation for the payment to the defendant of the two sums of 500*l.* and 200*l.* in full, as well as his whole debt when ascertained, being illegal, the arrangement contemplated by the agreement is void.

We are therefore of opinion, that judgment upon the demurrer to the declaration must be given for the defendant.

Judgment for defendant

SILVER and Others against BARNES.—p. 180.

The members of a benefit society raised a joint stock fund, portions of which were from time to time advanced to members of the society, by way of loan, at 5 per cent interest: the sums so advanced were put up to competition among the members, and the member who bid highest obtained the loan: defendant, a member of the society, having bid 15*l.* 17*s.* 6*d.* for a loan of 80*l.*, the 15*l.* 17*s.* 6*d.* to be paid in addition to 5 per cent. interest on the 80*l.* Held, that the transaction was not usurious.

THIS was an action by the payees against the maker of a promissory note for 80*l.* and interest, bearing date April, 1836, and payable on demand.

Plea, that the promissory note in the declaration mentioned was a certain promissory note whereby the defendant and one S. E. Webber, J. Rice, and J. T. Elvis, as his sureties in that behalf, jointly and severally promised to pay the plaintiffs, on demand, 80*l.*, value received, with interest for the same; and that before the making, delivery, and acceptance of the said promissory note, to wit, on the 17th April, 1836, it was corruptly and unlawfully, and against the form of the statute in that case made and provided, agreed between the defendant and the plaintiffs, and divers other persons to the defendant unknown, with the privity and consent of the plaintiffs, that the plaintiffs and the said other persons, with the privity and consent of the plaintiffs, should lend and advance to the defendant from the fund or stock of a certain society, called the Woodbridge Mutual Benefit Society, the sum of 80*l.*; that the plaintiffs and the said other persons, with the privity and consent of the plaintiffs, should forbear and give day of payment thereof to the defendant, as hereinafter mentioned; and that the defendant, for the loan of the said 80*l.*, and for giving day of payment thereof, should give and pay to the plaintiffs and the said other persons, with the privity and consent of the plaintiffs, more than lawful interest at and after the rate of 5*l.* for the forbearance of 100*l.* for a year on the said sum of 80*l.*; viz. that the defendant should pay and give to the plaintiffs and the said persons, with the privity and consent of the plaintiffs, a certain sum, to wit, 15*l.* 17*s.* 6*d.*, making, together with the said sum of 80*l.*, so to be lent and advanced by the plaintiffs and the said other persons, the sum of 95*l.* 17*s.* 6*d.* for the preference of having the said loan of 80*l.*; to wit, by monthly instalments of 2*s.* upon every 10*l.* of the said sum of 80*l.*, until the whole of the said sum of 15*l.* 17*s.* 6*d.* should be paid, together with the interest of such loan of 80*l.* after the rate of 5*l.* for 100*l.* by the year, from the 18th April, 1836, until the payment by the defendant of the said sum of 80*l.* to the plaintiffs and the said other persons; and that, for securing the repayment to the plaintiffs and the said other persons of the said 80*l.*, with interest thereon, as aforesaid, the defendant and three other persons, as his sureties in that behalf, should make and deliver to the plaintiffs a certain promissory note in writing, whereby the defendant and the said three other persons, as his sureties in that behalf, should jointly and severally promise to pay to the plaintiffs, on demand, 80*l.* value received, with interest for the same. That, in pursuance of the said corrupt and illegal agreement so made as aforesaid, the plaintiffs, and the said other persons, with the privity and consent of the plaintiffs, afterwards lent and advanced to the defendant the said sum of 80*l.* from the fund or stock of the society called the Woodbridge

Mutual Benefit Society; and that for securing the repayment to the plaintiffs, and the said other persons, of the said 80*l.*, with interest for the same, the defendant and S. E. Webber, J. Rice, and J. T. Elvis, as his sureties in that behalf, made and delivered to the plaintiffs the said promissory note in the declaration mentioned, and the plaintiffs then accepted and received the said promissory note in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid. And the defendant averred, that the said sum of 15*l.* 17*s.* 6*d.*, so as aforesaid agreed to be given and paid to the plaintiffs and the said other persons in manner aforesaid for the purpose aforesaid, and the interest upon the loan of 80*l.*, reserved and secured and made payable to the plaintiffs upon or by the said promissory note, exceeded the rate of 5*l.* for the forbearing and giving day of payment of 100*l.* for a year, contrary to the statute, &c. By means whereof, and by force of the said statute, the said promissory note was void. Verification.

Replication. That the promissory note was made and delivered by the defendant, as in the first count mentioned, for a good and lawful consideration, and not in pursuance of or upon any such corrupt or unlawful agreement, nor for such purpose or as in the said plea mentioned, in manner and form as the defendant had in his said plea in that behalf alleged.

At the trial before VAUGHAN, J., it appeared that the plaintiffs were the treasurers, and the defendant a member of the Woodbridge Mutual Benefit Society, and that the promissory note was given by the defendant for 80*l.* of the society's money, which was put up to auction among the members of the society, to be advanced to the highest bidder, and repaid by him with interest at 5 per cent. The defendant bid 15*l.* 17*s.* 6*d.* for the advance.

The rules of the society commenced with the following preamble:—
“Whereas the several persons, members of this society, whose names are inscribed in the book containing the amount of their shares therein, have, for their mutual benefit, by subscriptions every four weeks, raised a sum of money, and have agreed by further monthly subscriptions, to be paid every Wednesday four weeks, during the continuance of the said society, as after mentioned, to raise a further sum of money, with the intention of afterwards lending or advancing the same to some of the said parties, at interest, at the rate of 5*l.* for 100*l.* by the year, in the proportions, in such manner, and under such regulations as are hereinafter mentioned, so that every member of the society shall have advanced or allotted to him, on loan, a sum of money as after mentioned; and, in order to the more regularly and effectually carrying on the concerns of the said society, and promoting the intention of the members thereof, the following rules, laws, and regulations have been agreed to, adopted, and signed by the said members, for their mutual observance:” and

Among the rules were the following:—

8. “Every member of this society, his executors or administrators, shall pay to the treasurer or his deputy, or person acting as such, at every monthly meeting, during the first hour of business, viz. from half-past seven to half-past eight, 2*s.* 6*d.* upon every 10*l.* for which he shall subscribe, for the first forty nights of the society; after that time 2*s.* upon every 10*l.*; and when he shall have a loan or allotment of money from the fund or stock of the club, he shall also pay the additional sub-

scription he shall agree to give for the preference of having such a loan, by monthly instalments of 2s. upon every 10l. so advanced or allotted to him, until the whole of such additional subscription shall be paid, together with interest for such loan or sum so advanced, after the rate of 5l. for 100l. by the year.

12. "When the treasurer shall have in hand, at any of the monthly meetings, the sum of 20l. of the money so subscribed at any of the monthly meetings, the same shall be put up for sale,—the highest bidder to be the purchaser,—and he may have from the fund any sum not less than 20l. (except by the consent of the committee,) nor more than the sum he subscribes for. He shall, at the same time, inform the secretary what sum he will take; and within one day inform the secretary, in writing, the names, trades, and places of abode of the persons he may propose as sureties for the money: and upon giving approved security to the committee of the society for the same, shall have such advance or allotment of money paid to him by the treasurer, on paying the stamp duty upon the security given and entered into by him and his sureties. Should there at any time be no bidders, the money in hand shall be allotted by ballot. The first drawn shall be obliged to have the preference, and shall take all the money in hand, in case he can have it, without a joint security; and if the person drawn does not take all the money, to continue drawing till it is disposed of. If any member do not take the money he agreed to have, at any monthly meeting, he shall pay, at the next monthly meeting, one month's interest on the sum he so agreed to take, and also whatever sum may be deficient in the additional subscription which shall be agreed to be given, at the next monthly meeting, when the same shall be disposed of. All moneys that shall from time to time be disposed of by way of sale shall be secured to the society in the names of the treasurer and committee for the time being.

15. "All monthly and additional subscriptions, interests, fines, forfeitures, (except fines of the committee-men for neglecting to attend the monthly meetings of the committee at the time appointed,) extra and other payments, shall be paid to the treasurer, and shall constitute and be the fund stock of the society; and all expenses incurred by the treasurer, the secretary, the committee, or any other member of the society, in or about the affairs and concerns of the society, under the direction and authority of any monthly or special general meeting of the committee, shall be paid out of the fund or stock; but not any of the stock shall be expended in feasting.

16. "Immediate payment shall be made to the treasurer of all sums for which the members are or shall be liable, under these or any subsequent rules, orders, or regulations, to be duly made; and which sums shall be recoverable by law, as liquidated damages; or the treasurer, at his option, may retain and deduct the same from any money in his hands which shall have been subscribed by the person from whom such payments are to be made.

26. "The said society, and these rules, laws, and regulations shall be, remain, and continue in full force and effect, and all and every of the members of the society shall be thereby bound, until all such members, or their assigns, executors, or administrators, as aforesaid, respectively, shall have borrowed and received the whole amount of money for which they shall respectively have so subscribed, and until all

arrears, fines, and forfeitures, in and under any of the preceding rules, shall be paid."

It was contended at the trial that the rules of the society were only a contrivance to elude the laws against usury; that the defendant's contract was clearly usurious, the principal money never having been placed in hazard, and a sum of 15*l.* 7*s.* 6*d.* having been agreed to be paid for the loan of 80*l.* in addition to an interest of 5 per cent.

The learned judge left it to the jury to say whether the partnership was a shift and contrivance to evade the usury laws; if so, they were to find for the defendant; but if they thought it a *bonâ fide* partnership, to find for the plaintiffs. The jury gave a verdict for the plaintiffs, which

B. Andrews moved to set aside, on the ground of misdirection, contending, as at the trial, that the note had been given upon a usurious loan. In *Barclay v. Walmsley*, 4 East, 55; 5 Esp. 11, it was held not usurious for an acceptor of a bill of exchange at two months to pay it before it became due on receiving a premium of 6*d.* in the pound; but in that case there was no borrowing and no repayment: here the defendant had, in effect, borrowed, and must repay the 80*l.*

Cur. adv. vult.

TINDAL, C. J. This was an action by the payees against the maker of a promissory note given by a member of a benefit society for an advance of money from the society. It was contended at the trial that the contract was usurious; but the learned judge who tried the cause thought that there had been no loan, but merely an advance of partnership funds, in which the defendant was interested in common with the other members of the society. A motion has been made for a new trial on the ground of misdirection; but we think the case was properly left to the jury. The question was, whether the transaction was a loan of money or a dealing with the partnership fund. If it was a loan it was usurious. We think it was a dealing with the partnership fund, in which the defendant had an interest in common with the other members of the society, and that it was not a loan. The defendant was interested in the fund when the money was advanced and when it was repaid. The rules of the society are, in effect, a mere agreement by partners that their joint contributions shall be advanced for the use of one or the other as occasion requires; and the transaction in question was not a borrowing by the maker of the note from the payees.

In a case before ALEXANDER, C. B., in the year 1828, he held an advance from a similar society to one of its members to be a partnership transaction, and not a loan.

Rule refused.

In the Matter of the Serjeants at Law.—p. 187.

At the commencement of business on the first day of this term

Wilde, Serjt., on behalf of Serjts. *Taddy*, *Spankie*, *Aitcherley*, *Mercwether*, and himself, begged leave to call the attention of the judges to the departure which had recently taken place from the ancient, legal, and established practice of this court, which he humbly contended amounted to a violation of the constitution of the court itself. He referred to the permission granted to the gentlemen of the bar generally

to practise in the Court of Common Pleas. His learned brothers and himself felt that the present was the fittest moment to call the attention of their lordships to the subject, and most respectfully, but most earnestly, to protest in the name of the constitution and of the law against the continuance of that course of practice. It would be in their lordships' recollection that in the year 1834 a warrant under the sign manual of the crown was sent to the judges of this court, commanding them to open it to the members of the bar generally. (a) Until the very morning on which that warrant was read in court the serjeants were ignorant of its contents or form. They had received no notice on the subject; and although they were aware that some measure of the sort was in contemplation, they were wholly ignorant of the form or terms in which it was to be effected until they heard the warrant itself read in court. Their lordships, upon receiving the royal mandate, thought at the moment, without bestowing further consideration upon the subject, that they were bound to obey it, and accordingly they ordered it to be recorded, and proceeded to call upon the other gentlemen of the bar to move. The serjeants, however, entertained at the time a strong opinion that the warrant was illegal, and that any interference on the part of the crown with the ancient and established practice of the court was an unconstitutional exercise of the prerogative; but they deemed it respectful and proper to forbear to interfere until they should thoroughly satisfy their minds on the subject. They were, moreover, ignorant as to how far the judges of this court had countenanced, or sanctioned, or were parties to the measure. In short, the document came by surprise upon the bar of this court, and therefore they forbore on the instant to interfere, notwithstanding their strong opinion of its illegality. In that opinion they were confirmed by the recollection of what had taken place in the year 1755, when one of the learned judges then on the bench proposed partially to open this court to the general bar. For that purpose a bill was prepared to be introduced into parliament, thereby showing the opinion which then prevailed, that it required a legislative enactment to alter the established practice of the court. The bill was afterwards abandoned, because, upon further reflection, it was not considered that the interests of the public called for such a measure. Then, again, their lordships were aware that when the bill for opening the Central Criminal Court was introduced into parliament, it contained a clause consisting of four or five lines for partially opening this court, which clause was afterwards struck out, but which furnished an additional proof of the conviction which prevailed, that the authority of the legislature was necessary to effect any change in the constitution and practice of the court. So recent an instance as this must preclude all notion that a warrant under the sign manual of the crown could legally effect such a purpose. Their lordships, however, in the absence of all objections to the validity of the warrant, having proceeded to act in obedience to it, those serjeants whom he now represented felt themselves placed in a situation of considerable embarrassment. They held patents from the crown; they were officers of the crown, and as such were bound to pay obedience to the authority of the crown. When, therefore, they were convinced that that authority had been illegally exercised; it behoved them to consider of the most respectful mode of communicating with the crown on the subject. Their lordships would

(a) See 10 Bingh. 571; and *Power v. Izod*, 1 New Cases, 304, (27 E. C. L. R. 401)

remember that Mr. Serjt. *Taddy* had, in a subsequent term, intimated to the court his intention of bringing the subject under the consideration of their lordships at a future day; but, upon further reflection, it was deemed more respectful and more delicate to bring the question of the validity or invalidity of the warrant to the notice of the crown, and afford it an opportunity of taking advice upon the subject. With that view they presented a memorial, not praying the crown to withdraw the warrant, but merely to take advice as to the legality of that document. The crown had been pleased to refer the memorial to the judicial committee of the Privy Council, before whom the subject underwent a discussion, which lasted three days. Three of the learned judges now in court, were present during that discussion. There was also present another member of this court, whose recent loss was deeply lamented. Mr. Justice VAUGHAN's general amenity and kindness towards the bar had endeared him to the whole profession. The crown condescended to call in the attorney-general and solicitor-general to attend the discussion; and during the three days that it lasted not one suggestion fell from any quarter in support of the legality of that warrant. On the contrary, the law officers of the crown in express terms stated, they apprehended that the matter rested with the judges, who alone had the power to regulate the practice of the court, and that the warrant was not binding upon their lordships. The attorney-general admitted that he could find no precedent to support that warrant. The solicitor-general expressed himself to the same effect. Lord ABINGER said it was a very illegal proceeding to take away the exclusive privileges of a court merely by an act of the royal prerogative. Ultimately, however, the consideration of the subject was adjourned *sine die*, and the crown declined to interfere. The serjeants, therefore, having discharged the duty of respect to the crown, now came to this court and prayed their lordships that the practice of the court might be allowed to take its constitutional course, as regulated by the common law and the statute. They were aware that some inconvenience would result from a recurrence to the ancient legitimate practice, and therefore they had forborne to press the matter, in order to afford the legislature an opportunity of passing some measure on the subject. A bill was accordingly brought into the House of Lords by the lord chancellor, partially opening the court, which would have been unnecessary if the warrant were valid, but neither the attorney-general nor anybody else would take it up in the House of Commons, and so it fell to the ground. The serjeants, therefore, stood thus: they had brought the warrant under the notice of the crown, and the law officers of the crown abandoned its legality; they had afforded an opportunity for the enactment of a legislative measure; that had not been proceeded with. They had taken every course that respect and delicacy suggested, and they felt that they were now warranted in calling upon their lordships to vindicate the constitution of their court. The rank and office of serjeant were as ancient, and rested on the same foundation, as those held by their lordships; there was no evidence of the existence of the court without them; they were as ancient as the law itself. The serjeants, therefore, independently of personal interests, considered that any attempt to alter the constitution and practice of the court by a mere act of the royal prerogative, would go to shake the foundation of every court in the empire. At present every court in Westminster

Hall was struggling for an exclusive bar, the necessity of which had been proved by experience. But in the Common Pleas, where there was already a distinct bar, it was proposed to do away with it, and create the very evil against which the other courts were struggling. He appealed to their lordships—he appealed to every one who had practised in that court, whether the departure from the old practice had been productive of any public convenience. The serjeants claimed their privileges more confidently now that experience had proved the ancient practice best adapted to advance the public interests and convenience. It might, perhaps, be suggested that it was fitting to wait until they had called upon her majesty to recall the document issued in 1834; but, as one who took an interest in the character and integrity of that court, he should be the last to recommend such a course of proceeding; he should consider it a great degradation of that court. He begged most respectfully to remind their lordships of the oath which the judges of that court had taken, since the time of Edward III., to attend to no letters or mandates from the crown, whether signed with the great seal or the privy seal, which would tend to the disturbance of the common law, and to hold their courts according to ancient usage; (a) and all that he now asked was, that their lordships would

(a) By 18 Ed. 3, st. 4, the oath of the justices is as follows:—"Ye shall swear, that well and lawfully ye shall serve our lord the king and his people in the office of justice, and that lawfully ye shall counsel the king in his business, and that ye shall not counsel nor assent to anything which may turn him in damage or disherison of any manner, way, or colour. And that ye shall not know the damage or disherison of him, whereof ye shall not cause him to be warned by yourself, or by other; and that ye shall do equal law, and execution of right, to all his subjects, rich and poor, without having regard to any person. And that ye take not by yourself, or by other, privily or apertly, gift nor reward of gold nor silver, nor of any other thing which may turn to your profit, unless it be meat or drink, and that of small value, of any man that shall have any plea or process hanging before you, as long as the same process shall be so hanging, nor after for the same cause. And that ye take no fee, as long as ye shall be justice, nor robes of any man, great or small, but of the king himself. And that ye give none advice or counsel to no man, great nor small, in no case where the king is party. And in case that any, of what estate or condition they be, come before you in your sessions with force and arms, or otherwise against the peace, or against the form of the statute thereof made, to disturb execution of the common law, or to menace the people that they may not pursue the law, that ye shall cause their bodies to be arrested and put in prison; and in case they be such that ye cannot arrest them, that ye certify the king of their names, and of their misprision hastily, so that he may thereof ordain a convenient remedy. And that ye by yourself nor by other, privily nor apertly, maintain any plea or quarrel hanging in the King's Court, or elsewhere in the country. And that ye deny to no man common right by the king's letters, nor none other man's, nor for none other cause; and in case any letters come to you contrary to the law, that ye do nothing by such letters, but certify the king thereof, and proceed to execute the law, notwithstanding the same letters. And that ye shall do and procure the profit of the king and of his crown, with all things where ye may reasonably do the same. And in case ye may be from henceforth found in default, in any of the points aforesaid, ye shall be at the king's will of body, lands, and goods, thereof to be done as shall please him, as God you help and all saints."

By 2 Ed. 3, c. 8, "Item, it is accorded and established, that it shall not be commanded by the great seal nor the little seal to disturb or delay common right; and though such commandments do come, the justices shall not therefore leave to do right in any point."

By 14 Ed. 3, c. 14, There shall be four writs of search for the king, "so always that every of the four writs be delivered to the treasurers and to the chamberlains forty days before the day of the return; and that by commandment of the great seal, or privy seal, no point of this statute shall be put in delay; nor that the justices, of whatsoever place it be, shall let to do the common law by commandment, which shall come to them under the great seal or privy seal."

By 20 Ed. 3, c. 1, "We have commanded all our justices that they shall from henceforth do equal law and execution of right to all our subjects, rich and poor, without having regard to any person, and without omitting to do right for any letters or commandment which may come to them from us, or from any other, or by any other cause. And if that any letters, writs, or commandments come to the justices, or to others deputed to do law and right according to the usage of the realm, in disturbance of the law, or of the execution of the same, or of right to

hold the court according to the ancient practice which had obtained in it. The question was, what course ought the judges to pursue? They had been satisfied that the warrant upon which they had acted was illegal. Should it, then, forever appear upon the records of the court, that their lordships, having received an illegal warrant from the crown, and having acted upon it, should continue to act upon it after its illegality was confessed by the law officers of the crown, until the crown was pleased to recall it? The dispensing power had gone by; there were no dispensations now; and he respectfully called upon their lordships to remember the oaths which they had taken. Could it be said that it would not be respectful to the crown for the judges of the court to disregard that warrant? But in answer to that suggestion, he could not have a better authority than that of the learned lord who was chancellor when the warrant was issued; and that noble and learned lord had said, that "the course most respectful to the crown, which the judges, or any class of the people, could pursue, was to do their duty, and to treat an illegal order as a nullity; not to wait until the crown was pleased to revoke it." Besides, he would ask, was it gracious to call on the sovereign to recall an act of her predecessor on the throne? There was no rank in the kingdom which was founded on a better title than that of the serjeants; and if their rights could by the sign manual be at once destroyed, then the peerage, and all offices and privileges, were at the mercy of the crown; and, however safe they might be in the present day, that did not affect the question, for the law looked to security in days of evil. In obedience, therefore, to the terms of their oath, to which he had respectfully called their attention, and in compliance with the ancient constitution and practice of the court, he, on behalf of his learned brothers and himself, now called on their lordships to exclude all barristers, not of the degree of the coif, from practising in that court. If, by the consent of the serjeants, any arrangement could be made for allowing those who were engaged in business now before the court to be heard until that business was concluded, they could have no objection; but, after much deliberation, they were apprehensive that no legitimate course of that kind was open. He prayed their lordships to attend to the constitution of the court, to attend to the state of the common law, on which it was built, and to remember that the power which could open the court could also close it in times of another political aspect. The application which he now made to their lordships was, that they would call on serjeants, and serjeants only, to plead in that court.

TINDAL, C. J., after conferring for a few minutes with the three other judges on the bench, said that the subject-matter of the application was one of very deep importance, both as regarded the constitution and practice of the court, and also the interests of the public. It required, therefore, serious consideration on their part before they made any reply to the address with which it had been brought under their attention; but as early as was possible they would make the bar acquainted

the parties, the justices and other aforesaid shall proceed and hold their courts and processes where the pleas and matters be depending before them, as if no such letters, writs, or commandments were come to them; and they shall certify us and our council of such commandments which be contrary to the law, as afore is said."

By 11 Ric. 2, c. 10, "Item, it is ordained and established, that neither letters of the signet, nor of the king's privy seal, shall be from henceforth sent in damage or prejudice of the realm, nor in disturbance of the law."

with their decision. In the mean time, it was hardly necessary to say that the practice of the court must continue as it had been of late years.

Cur. adv. vult.

TINDAL, C. J., now said,—With respect to the application which was made to the Court on the first day of the term, by my brother *Wilde*, on the subject of the sole and exclusive privilege of the serjeants being heard and practising in this court, notwithstanding the warrant under the sign manual, we have given the matter very full consideration, and have resolved on the course we intend to adopt. Upon the first day of next term,—or, in case particular circumstances should prevent me from attending, then, on an early day after my return,—in case any gentleman not of the degree of the coif shall be present, I shall not call upon him to move. But, at the same time, if such gentleman so passed over shall be desirous of making any observations as to the right of himself and of other members of the bar, not being of the degree of the coif, to be heard, we shall be willing to hear him, and receive any farther information on that point, and shall, either then, or, if his observations shall appear to require further consideration, at some future day, announce the course we intend finally to adopt, and the reasons on which it will be founded.

MEMORANDA.

IN the course of this term, Sir *R. M. Rolfe*, her majesty's solicitor-general, was called to the degree of the coif, and gave rings with the following motto:—"Suaviter Fortiter." He was immediately afterwards appointed a baron of the Court of Exchequer, and took his seat in the room of Mr. Baron *Maule*, who had been transferred to the seat in the Court of Common Pleas vacant by the death of Mr. Justice VAUGHAN.

On the 2d of December, Mr. Serjeant *Wilde* was appointed to succeed Sir *R. M. Rolfe* in the office of her majesty's solicitor-general, and took the oaths accordingly.

NEW CASES
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS.

Hilary Term,

IN THE

Third year of the reign of Victoria.—1840.

The Judges who usually sat in Banc during this term were,

TINDAL, C. J.,
BOSANQUET, J.,

ERSKINE, J.,
MAULE, J.

PAINTER against LINDSELL.—p. 197.

Defendant, who had borrowed money of plaintiff, was, by an agreement, to which plaintiff's attorney was the attesting witness, to pay the expenses of that agreement, and of the various securities, including a warrant of attorney :

Held, that plaintiff's attorney, who had prepared those securities, was compellable to deliver his bill to defendant to be taxed.

THE plaintiff advanced money to the defendant upon the security of an annuity, and by an agreement between the parties, the expenses of preparing that agreement and the various securities, among which was a warrant of attorney to confess judgment, were to be defrayed by the defendant.

Duncan, the plaintiff's attorney, managed the whole business, and was witness to the agreement.

Shaw, a relation of the defendant, was surety for him ; and at Shaw's request the securities were laid before Wilkinson, as attorney for the defendant.

Duncan being afterwards called upon by Wilkinson to deliver his bill of costs to the defendant, said, "I shall give him no bill of costs; he has had one; and unless he pays the bill I shall sue out a writ to-morrow."

Whereupon an order was obtained from a judge at chambers, requir-

ing Duncan, "the defendant's late attorney," to deliver his bill of costs to Wilkinson, the defendant's present attorney, to be taxed.

The bill made out by Duncan contained a charge for the warrant of attorney.

White obtained a rule *nisi* to set aside the judge's order, upon an affidavit that Duncan had never acted as attorney for the defendant, unless the preparing the agreement that the defendant should pay the expenses of the annuity transaction, constituted him such; Wilkinson having, in the subsequent part of the business, acted as the attorney of the defendant.

Chandless, who showed cause, contended that Duncan, having drawn and witnessed the agreement, and being privy to it, was entitled to sue the defendant for these costs: *Webb v. Rhode*, 3 New Cases, 732, (32 E. C. L. R.): if so the defendant was entitled to have them taxed. 2 G. 2, c. 23, s. 23.

White, in support of the rule, argued that Duncan, never having been retained as attorney for the defendant, was not in a condition to sue him, and therefore not bound to deliver his bill to the defendant to be taxed. His threat to sue out a writ if the bill were not paid, meant a writ in the name of the plaintiff.

BOSANQUET, J. I am of opinion that this rule must be discharged. The question is, whether the defendant is liable, either separately or jointly, for the costs and expenses of preparing this security; because, if he be liable, he is entitled to have the bill taxed. The plaintiff is the lender, the defendant the borrower, of a sum of money, and Duncan draws up the agreement which, as between the plaintiff and defendant, regulates who is to pay the expenses. The stipulation is that the expenses of preparing the security shall be paid by the defendant: Duncan is employed to transact the business, in which both are interested, though it does not appear by which of them he was retained; but he draws, and is witness to the agreement; and a warrant of attorney forms part of the securities: that is a taxable item, and renders the whole bill taxable.

Assuming that there was any ambiguity in the agreement as to the party who was to pay Duncan, we must look to his conduct to see what construction he himself put upon it: and his conduct is conclusive; for when he is called on to deliver a bill to the defendant, he says, "I shall give him no bill of costs; he has had one; and if the costs are not paid I shall sue out a writ to-morrow."

This shows that Duncan considered the defendant liable to him; and for the present purpose it is immaterial whether he was separately or jointly liable.

ERSKINE, J. The question is, whether Duncan was employed by the defendant or not. The defendant says he was: Duncan does not say he was not; but not, unless the defendant's interpretation of the agreement be correct. As to that, it does not follow because Wilkinson was his attorney for one purpose, that Duncan was not for another; and Duncan does not go to the plaintiff for the costs, but claims them of the defendant, and threatens a writ if they be not paid. As the plaintiff had not paid them, for, if he had, the writ would not have been threatened, by whom could Duncan mean the writ should be sued out, if not by himself? thereby admitting that he had acted as the defendant's attorney. I think the rule must be discharged.

MAULE, J. I agree that the power to call for a bill and the power to

tax it are co-extensive. But Duncan did the work on the part both of borrower and lender; the preparation of the securities was for the benefit of both; both, therefore, were liable to pay the costs, and an arrangement was made that one should pay the whole. Duncan, then, was right in considering the defendant liable to him, and that appears to have been the intention of the parties. As he might have sued the defendant, the defendant was the party under 2 G. 2, c. 23, to call for his bill and tax it. Rule discharged.

TINDAL, C. J., was absent on a Special Commission at Monmouth, for the trial of Frost and others for treason.

BARRON against FITZGERALD.—p. 201.

B. and S. having been directed by defendant to effect an insurance on his life in his own name, or in the names of B. and S., to whom he was indebted, effected an insurance in the names of B., S., and a third person, whom they had taken into partnership:

Held, that they had no authority for effecting the insurance in the three names; and, defendant having never acknowledged the transaction, that they could not recover from him the amount of premiums paid on the policy.

ASSUMPSIT for money paid in respect of premiums on a policy of insurance. Plea, *non assumpsit*.

It appeared at the trial, that on the 26th of April, 1832, the defendant addressed the following letter to the plaintiff, Barron, and his then partner, Stewart.

"I have to request that you will pay the premium for an insurance on my life for 200*l*. for seven years, and continue the future payment for the same on my account. This insurance being chiefly to secure your debt, you can have the policy effected in your own names, it being understood that when I shall be clear with you it is to be re-assigned to me; and in the event of my death before you shall have been paid off, it is my wish that the surplus, after you are satisfied, be paid over to Edward Parrott, in whose debt I am the sum of 100*l*."

The policy was effected in the name of Barron and Stewart, who paid the premiums on the 27th of April, 1832, and 27th of April, 1833. In August, 1833, the defendant paid off the whole of Barron and Stewart's claim, and had no further dealings with them. They omitted, however, to assign the policy to him.

In September, 1833, the defendant went to the West Indies; and in November, Barron and Stewart paid the additional premium for the sea risk, but omitted to pay the annual premium in April, 1834.

However, in November, 1834, they renewed the policy in the names of Barron, Stewart, and Smith, who at that time had become a member of the firm; made a declaration that all three were interested in the life of the defendant; and afterwards paid the premiums down to 1838, when Stewart having died, and the defendant having refused to acknowledge the renewed policy, the plaintiff commenced this action, as survivor of the firm of Barron and Stewart.

At the trial, the plaintiff produced the first policy, but failed to call the attesting witness; the learned judge, however, who presided, admitted the document in evidence, notwithstanding objections made to

its reception; and the payments in respect of the renewed policy having been proved, it was left to the jury to say,

Whether Barron and Stewart were authorized to renew the policy;

Whether they were authorized to renew it in the names of Barron, Stewart, and Smith;

Whether they renewed it for the entire partnership; and

Whether the premiums were paid by Barron and Stewart.

A verdict was found for the plaintiff for the amount of the premiums paid on the renewed policy, with leave for the defendant to move to enter a nonsuit instead, if the Court should be of opinion that the first policy ought not to have been received in evidence, or that Barron and Stewart had no authority to effect the renewed policy.

A rule *nisi* having been obtained accordingly on those grounds,

W. H. Watson, who showed cause, contended that, as the plaintiff sought to recover only the premiums paid in respect of the renewed policy, proof of the policy effected in April, 1832, was unnecessary: as to the objection that the renewed policy had been effected in the names of Barron, Stewart, and Smith, instead of Barron and Stewart only, the effect of the defendant's letter of April, 1832, was to authorize an insurance to be made for his own benefit; it was immaterial in whose names; the persons named, whoever they might be, would be trustees for the defendant; and as the authority was to effect an insurance for seven years, it was the plaintiff's duty, when the first policy expired in consequence of his omission to pay the second year's premium, to effect a renewed policy for the remaining five years. The verdict given had established the authority to renew the policy, and to renew it in the names of Barron, Stewart, and Smith.

Bompas, Serjt., *Kelly*, and *Petersdorff*, in support of the rule, argued that, without proof of the first policy, which ought not to have been received without calling the attesting witness, the plaintiff could not explain on what authority he had effected the renewed policy; that the authority contained in the letter of April, 1832, ought to have been strictly pursued; *Com. Dig. Attorney*, C. 11. 13. *Fenn v. Harrison*, 3 T. R. 762; *Attwood v. Munnings*, 7 B. & C. 278, (14 E. C. L. R. 42,) and that the effecting the renewed policy in the names of Barron, Stewart, and Smith, instead of the names of Barron and Stewart, was a departure from the authority in a material particular, and might have been greatly prejudicial to the defendant: the two in whom he had confidence might have died, and have left him in the power of the third, who might have been an entire stranger; the third might have been in a foreign country, and his absence might have cast impediments in the way of any assignment of the policy; or, if the defendant's executor were sued by the executor of the survivor of the two, for a debt due to the two, the third having received the amount of the policy, the defendant's executor could not set off against such demand the money so received by the third. Further than this, the renewed policy was void, for after payment of their debt, Barron and Stewart had no interest in the defendant's life; *Godsall v. Boldero*, 9 East, 72. But if it was properly effected in the name of the three, then Smith should have joined in the action.

BOSANQUET, J. This is an action brought by Barron, who has survived his partner Stewart, to recover the amount of premiums paid on a policy of insurance effected, as the plaintiff alleges, by order of the

defendant. In April, 1832, Barron and Stewart being the agents of the defendant, he ordered them to effect an insurance on his life for seven years: a policy was obtained accordingly, which at the end of two was suffered to lapse; in the meantime Barron and Stewart had taken Smith into partnership, and in November, 1834, effected another policy for the remainder of the term of seven years in the names of Barron, Stewart, and Smith, for the amount of the premiums paid on which this action is brought.

To launch the plaintiff's case, the first policy was offered in evidence without calling the attesting witness; the defendant objected to its reception on the ground of the absence of that witness, but the instrument was read notwithstanding. It is now contended on the part of the plaintiff that it was not material to his case, as he sued only for the amount of premiums paid on the renewed policy: but the first policy was produced and shown to the jury; the object of the plaintiff was to prove that the policy for five years was a continuation of the policy which was suffered to expire at the end of two; and it is impossible to say that the jury did not take it into consideration when they were called on to say, whether or not there was any authority for effecting the insurance: it would be a ground for a new trial, therefore, that the instrument was read without calling the attesting witness.

But the other objection goes to a nonsuit. The plaintiff was ordered to effect a policy in the name of the defendant, or of Barron and Stewart: the policy in respect of which he sues is effected in the names of Barron, Stewart, and Smith; and the question is, whether the defendant's letter of April, 1832, authorized the plaintiff to effect the policy in those names. It appears to me that it did not; and as there was no subsequent communication, nor any adoption of the policy, the premiums have been paid on the plaintiff's own account. It has been argued that it is immaterial in whose names the policy was effected, as it must still enure to the defendant's benefit; but the question is, whether he authorized such a policy, and, whether the difference in the names might not seriously affect his interests. One way has been shown in which it might. If Barron and Stewart had both died, Smith as survivor might have received the money, or released the insurance office to the inconvenience of the defendant's executor.

I think, therefore, that the insurance was not according to the power, and that the rule for a nonsuit must be absolute.

ERSKINE, J. I am of the same opinion on both points. It may be, that the plaintiff might have dispensed with the production of the first policy; but whether he might or not, as it was actually read to the jury, and they considered it in their verdict, the cause must go down again if it was not receivable in evidence, which it was not, the attesting witness not having been called. A new trial, however, becomes unnecessary, because the rule for entering a nonsuit must be made absolute. If the authority had been to effect the policy in the names of Barron and Stewart, or others, it might not have been necessary that Smith should join in the action, because he might not have had authority to pay the premium: but the order was to effect the policy in the names of Barron and Stewart, or of the defendant; and the addition of another name might have been most material to him. If the plaintiff and defendant had both died, Smith might have had to receive the amount of the policy; and then, if the plaintiff's executor

had sued the defendant's, he could not have set off the money in the hands of Smith.

MAULE, J. If the plaintiff chose to give the first policy in evidence, he could not dispense with the attesting witness; and without giving that policy in evidence, he could not show a ground for effecting the second. But I agree also that the plaintiff must be nonsuited, because the letter of April, 1832, gave him no authority to pay the premiums for which he now seeks to recover: that letter authorized him to pay premiums on a policy in the names of Barron and Stewart, and for the benefit of those two. I should not be disposed to construe such an authority very strictly; but the insertion of another name might make a great difference to the defendant, and, therefore, the policy should have been effected in the names specified by him. As the authority has been exceeded, the rule for a nonsuit must be made

Absolute.

TINDAL, C. J., was absent at Monmouth.

DOE dem. SCOTT against ROE.—p. 207.

Tenant in possession having absconded, leaving the key of his house in the hands of a broker, with instructions to let the house. Held, that service of a declaration in ejectment on the broker, and fixing a copy on the door of the house, was a sufficient service.

THE tenant in possession having absconded, leaving the key of the house for which this ejectment was brought, in the hands of a house-broker, in order that he might let the house, the lessor of the plaintiff served a declaration in ejectment on the clerk of the house-broker, at his office, and affixed a copy on the door of the premises.

Bingham, who moved for judgment against the casual ejector, referred to *Doe dem. Dickens v. Roe*, 7 Dowl. 121, as being similar to the present case in all its circumstances; and upon that authority

The Court made the rule

Absolute in the first instance.

HOGGETT against EXLEY.—p. 207.

Declaration on charterparty, that defendant had agreed to put a cargo on board at Marseilles, and pay freight by a bill on London, at three months. Breach, that defendant did not put any cargo on board, by which plaintiff was put to expenses in procuring one, and that defendant did not pay plaintiff those expenses, or give the bill in the charterparty mentioned, contrary to his promise:

Held, an unobjectionable breach, on motion in arrest of judgment.

THE declaration stated that, by a certain charterparty of affreightment made by and between the plaintiff, owner of the ship *Spring*, and the defendant, on the 17th of December, 1838, it was agreed that the said ship should, with all convenient speed, proceed to Marseilles, and there take on board, from the agents of the said freighter, a full and complete cargo of wheat; and should therewith proceed to London, or so near thereunto as she might safely get, and there deliver the same to the said freighter, or his assigns, they paying freight for the same 7s. per

quarter of wheat, and 10s. per cent. thereon in lieu of all pilotage and portcharges, during the said voyage, the act of God, &c. excepted; the freight to be paid one-half in cash, and the remainder by an approved bill on London, at three months' date: that, in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform the said charterparty in all things on his behalf as such owner to be performed, the defendant then promised the plaintiff to perform the said charterparty in all things on his behalf to be performed; and to provide and take, to and alongside of the said ship, the said cargo to be taken on board of the said ship, according to the true intent and meaning of the said charterparty. That the said ship, with all convenient speed, did arrive at Marseilles; and thereupon the said master was then ready and willing to take on board the full and complete cargo of wheat aforesaid, according to the terms of the said charterparty; and did then give immediate notice thereof to the defendant's agent. Yet the defendant, not regarding his said promise, did not, nor did any other person or persons on his behalf, provide and take, to or alongside of the said ship, such cargo of wheat as aforesaid, or any part thereof, according to the terms of the said charterparty; but on the contrary thereof wholly neglected and refused so to do; or to furnish any cargo whatever for the said ship on the said voyage: by means of which said several premises the plaintiff lost and was deprived of all the profit and advantage which he might and otherwise would have made under and by virtue of the said charterparty, amounting to a large sum of money, to wit, the sum of 1000*l.*, and the plaintiff was also, by reason of the premises aforesaid, put to great charges and expenses in and about endeavouring to procure and procuring another freight for his said ship for her homeward voyage, amounting to a further large sum, to wit, the sum of 500*l.*; of all which said several premises the defendant then had notice: but the defendant had not paid to the plaintiff the said sums of money, or any part thereof, or given the said bill in the said charterparty mentioned, but wholly neglected and refused so to do, contrary to his said promise; to the plaintiff's damage of 3000*l.*

A verdict having been given for the plaintiff, with general damages, *Bompas*, Serjeant, moved to arrest the judgment. The first breach is, that the defendant did not load the cargo according to the contract. A second breach consists of an allegation that the defendant has not paid certain sums, or given the bill in the charterparty mentioned, but has neglected so to do, contrary to his promise. Now the only bill which the defendant was bound to give, and the only bill which is mentioned in the charterparty, is a bill for freight; and the declaration does not allege that any such freight ever became due; on the contrary, it is expressly shown that no freight became due, and that the defendant never became liable to give any bill: neither does it appear that the nonpayment of the money mentioned in the declaration as charges and expenses, although the defendant had notice thereof, was contrary to his promise. The nonpayment of those sums, it might be said on the other side, was an immaterial averment, and could not affect the amount of damages; but the not giving a bill for such alleged expenses, assuming that the defendant was bound to give it, and that his not giving it was a breach of his promise, might most materially affect the amount of damages.

The objection is, in substance, that a bill is mentioned in the charter-party, and is to be given by the defendant under certain circumstances. The declaration alleges, as a breach, that the defendant did not give such bill, but neglected to do so, contrary to his promise; but does not show that the circumstances had occurred under which he was bound to give such bill. It cannot now be ascertained upon which of the two breaches the jury assessed the damages; they may, or may not, have awarded them in respect of the omission to give the bill of exchange; but as the damages are given generally, and one of the breaches is ill, the judgment ought to be arrested. In *Sicklemore v. Thistleton*, 6 M. & S. 9, where there was a lease by the plaintiff to Thistleton of a messuage and farm, at a yearly rent, payable quarterly; and Thistleton covenanted to pay the rent at the days and in the manner therein mentioned, and also to pay interest in case the rent should be behind three quarters, and the defendant covenanted that Thistleton should at all times during the term, well and truly pay the plaintiff the said rent at the respective days, and also interest, and should duly observe all the covenants; and that in case Thistleton should neglect to pay the rent for forty days, the defendant should pay on demand,—it was held, that the defendant was not chargeable until after forty days and demand made; and also, the plaintiff having declared generally, assigning for breach rent arrear, while it appeared upon oyer that the lease contained the qualification above stated, that the breach was ill assigned; and there being general damages upon the whole declaration, which contained other breaches well assigned, the judgment was arrested.

BOSANQUET, J. I think there is no ground for arresting the judgment here. The declaration contains, in substance, but one breach of the contract contained in the charterparty; namely, that the defendant did not load a cargo as he had engaged: that he did not give a bill was in consequence of his not procuring a cargo.

ERSKINE, J. I am of the same opinion. In *Sicklemore v. Thistleton* there were distinct breaches on distinct covenants; some well assigned, and one, ill: here there is but one breach, though the plaintiff has unnecessarily introduced the negative about the bill.

MAULE, J. This is but one breach, and in the ordinary form.

Rule refused.

TINDAL, C. J., was absent at Monmouth.

INGRAM against LAWSON.—p. 212.

A statement in a newspaper, that a ship of which plaintiff was owner, and master, and which he had advertised for a voyage to the East Indies, was not a seaworthy ship, and that Jews had bought her to take out convicts, Held to be a libel on plaintiff in his trade and business, for which he might recover damages, without proof of malice or allegation of special damage.

THE declaration stated, that the plaintiff was owner of a certain ship called the Larkins, and the master and commander thereof, and the said ship being in the East India Docks, in London, the plaintiff intended and was about to sail within three months, in and with the said ship from London to Madras and Calcutta, and had advertised for freight and passengers on the 31st of October, 1837, when the defendant, with a view to cause it to be suspected that the ship was sold to Jews to take

out convicts, and was unseaworthy and unfit for the reception of goods or freight, or passengers of respectability, maliciously published in the Times newspaper, of and concerning the plaintiff, and of and concerning him in the way of his said business and occupation, and of and concerning the said ship and the said intended voyage, the following libel:—"To the Editor of the Times.—Sir, I think no apology necessary for troubling you with the following statement; I have but one motive for giving publicity to the communication. I overheard a servant on our establishment remark to one of his fellow servants, that his old ship had returned to England at last, but that the captain had been forced to put in at the Cape, and procure twenty additional hands to pump the ship to enable her to complete her passage; but he understood the Jews had bought her, to take out convicts. With the recollection of the dreadful loss of life which, in several instances, has occurred from ships not seaworthy being employed for such purposes, I was induced to question the man, and learn that the ship's name is the Larkins. I think the captain's name is Ingram, late in the East India service. He tells me the voyage before last, when he was on board, they were obliged to pump every two hours all the way from Calcutta; and on this last voyage she was constrained to obtain the additional hands I have stated, to keep the ship afloat; but she is now purchased by some Jews for the purpose I have stated. I feel it my duty to give this publicity to it; I give you the statement as I heard it; I know nothing of the parties; and, as I have before remarked, I have but one motive, viz. the possible prevention of the recurrence of some fearful calamity. I am, sir, your obedient servant, W. T."

There was no allegation of special damage. But it was averred generally, that, by reason of the libel, the plaintiff was injured in his reputation as shipowner and master mariner, and it was believed that his ship was unfit for freight and passengers of respectability, and that he had conducted himself dishonestly and improperly in relation to the said intended voyage.

The defendant pleaded the general issue and a justification, which was held insufficient upon demurrer. (*a*)

The action was brought three days after the publication of the libel. The plaintiff proved at the trial, before MAULE, J., what was the average profit to the captain of a ship upon an East India voyage, and that, upon the first voyage which he took after the publication of this libel, (it was also after the action was commenced,) the plaintiff's profits were nearly 1500*l.* below the average. This proof was objected to on the part of the defendant, on the ground that the declaration contained no allegation of special damage, and that the loss alleged was incurred after the commencement of the action. The defendant's counsel, however, admitted that the plaintiff was entitled to *some* damages, but contended that the smallest amount would satisfy the justice of the case.

The learned judge told the jury that the only question was, what was the amount of damage the plaintiff had sustained; and that, with a view to estimate that, they might look to the nature of his business, and his general rate of profit. The jury gave a verdict for 900*l.*

Humfrey now moved for a new trial on the ground of alleged misdirection, or for an arrest of judgment.

The libel, he contended, was an imputation, not on the character of the plaintiff, but of the plaintiff's ship; and in order to sustain an action of libel or slander for disparagement of title, or of any chattel, the plaintiff must prove that the defendant was actuated by malice express or implied: *Hargrave v. Le Breton*, 4 Burr. 2422; *Smith v. Spooner*, 3 Taunt. 246; *Pitt v. Donovan*, 2 M. & Selw. 639.

The learned judge, therefore, ought to have left the question of malice to the jury. [MAULE, J. That point was never taken at the trial, and I was not required to put it to the jury: it was admitted by the defendant's counsel that the plaintiff was entitled to *some* damages; and the only question was, how much.] Then, the jury ought not to have been allowed to take into consideration the average profits of the plaintiff's business, or the loss upon a voyage which was not entered upon until after the action commenced. [MAULE, J. The damages were given for the publication of the libel.]

At all events, the judgment must be arrested, because a libel in disparagement of title, or of a mere chattel, is not actionable without allegation and proof of special damage: *Malachi v. Soper*, 3 New Cases, 371, (32 E. C. L. R. 161.)

BOSANQUET, J. I think no rule ought to be granted in this case. The substantial question for the Court is, whether this publication was a libel on the plaintiff in his business of a master mariner and shipowner, or merely amounted to a disparagement of the qualities of his ship: if it were merely the latter, then, as there is no allegation of special damage, nothing could be recovered; judgment must be arrested; and it would be immaterial to consider the point as to the proof of malice. But if it was a libel upon the plaintiff in his business, then, whether malice were proved or not, the plaintiff would be entitled to recover damages for statements injurious to his character, and which, from their nature, must be prejudicial to his business. It is very material, therefore, to look at the declaration, and see what it alleges. The inducement is, that the plaintiff was owner of a ship, and the master thereof; that he was about to sail in the ship from London to Madras and Calcutta, and had advertised for freight and passengers, when the defendant published of and concerning the plaintiff in the way of his business, and of and concerning the ship, the libel in question, which is, that the ship advertised for the intended voyage was, in effect, not seaworthy. The plaintiff then complains that, by reason of the libel, it was believed that the ship was unfit for freight or passengers of respectability, and that he had conducted himself dishonestly in relation to the intended voyage. It appears to me—looking at the statement in the inducement of the declaration, that the plaintiff was master and owner of the ship, that he had advertised her for a voyage, and that the libel was published of him in his business as such master and owner—that this must be esteemed a libel of him in his business; and that he is entitled to damages, though no proof of malice was given at the trial.

With respect to the damages, it had been urged that he could have sustained none, because he brought his action within three days of the publication. But he was not bound to wait till actual damage had been incurred. The jury were warranted in giving such damages as they thought fit, for the publication of the libel and the injury to his character in the way of his business. For these reasons, I am of opinion that there is no ground for disturbing the verdict or arresting the judgment.

COLTMAN, J. I am of the same opinion. If it had been necessary to prove malice or special damage, this verdict must have been set aside or the judgment arrested. But I am of opinion that such proof was not necessary. This is not a case of mere disparagement of a chattel, but a libel on the plaintiff in the way of his business, and with reference to an intended voyage. It is impossible, therefore, to say that the action is not maintainable independently of malice. To say of a shipowner, that he has sold his ship to carry convicts when she was in a condition in which she must be expected to go to the bottom, is as bad as saying of a wine merchant, that his wine is poisoned, or of a tea dealer, that his tea is made green by drying it on copper.

With respect to the damages, the jury must have some mode of estimating them; and they could not be in a condition to do so, unless they knew something of the nature of the plaintiff's business, and of the general return from his voyages. And there is no ground for arresting the judgment; the libel being published of the plaintiff in the way of his business, it was unnecessary to allege special damage.

ERSKINE, J. It is unnecessary to consider whether or not the question of malice ought to have been left to the jury, because the material point for decision is, whether, on the face of the declaration, this is not a libel on the plaintiff in the way of his business: and I am of opinion that it is. The plaintiff is described not only as master but as owner of the ship; it is alleged that he was about to take a voyage and had advertised for passengers; and then the libel asserts that the ship was in a condition in which she could scarcely be kept afloat, and had been sold to Jews to carry convicts. I think there could not be a more flagrant personal libel than such a statement made with respect to the master of a ship: and if it were a personal libel on the plaintiff, it is immaterial that it is also a disparagement of his ship.

Then, with respect to the damages; in order to enable the jury to form some judgment as to the effect the libel was calculated to produce, I think it was reasonable to let them know the nature of the plaintiff's business, and the amount realized by him in his various voyages.

MAULE, J. I see no reason for disturbing the verdict. The libel is an imputation on the plaintiff in his business as a ship owner and master mariner, and not a mere disparagement of the qualities of his ship. It was unnecessary, therefore, to put any question to the jury on the subject of malice, and no such question was raised at the trial: the only question raised then, was, as to the amount of damages, and the propriety of letting in evidence of the profits of the plaintiff's voyages. But that evidence was admitted, only that the jury might know what sort of business the plaintiff carried on; for the same amount of damages ought not to be given in respect of a libel on a plaintiff in the way of his business, where his trade is small, as where his trade is large. In the latter case, the libel is likely to be injurious to a greater extent than in the former.

The point raised in arrest of judgment is substantially the same as that which has been urged for a new trial: and I think no rule should be granted.

Rule refused.

SMITH against WHITE.—p. 218.

Plaintiff declared, that he retained defendant to print a work, and delivered paper to him for that purpose; that defendant accepted the retainer, and it became his duty to use due diligence in the printing; but that he neglected the business of his retainer, and proceeded with the printing in a dilatory manner, and further disregarded his duty and retainer in this, that, instead of using the said paper in the printing of plaintiff's work, he wrongfully pledged it to raise money for purposes of his own:

Held, that the declaration was properly conceived in case.

THE declaration stated, that before and at the times of the committing of the grievances by the defendant, the plaintiff was desirous of printing and publishing for sale, a certain work, to be continued annually, under the name and title of "The Catholic Directory and Annual Register," whereof the defendant then had notice. That on the 1st October, 1837, the plaintiff retained and employed the defendant at his request to print the aforesaid work for the plaintiff, for reasonable reward to be by the plaintiff paid to the defendant in that behalf; and the plaintiff then also delivered to the defendant at his request divers large quantities, to wit, sixty reams of paper, to be by the defendant used in and about the printing of the said work, and on which the same was to be printed; and the defendant then accepted and entered upon such retainer and employment, and took and received the said paper from the plaintiff for the purpose and upon the terms aforesaid; and thereupon it then became and was the duty of the defendant to use due diligence in and about the printing of the said work, and to proceed with the same with reasonable despatch, and also to print the said work upon the said paper so delivered to him by the plaintiff for that purpose. Nevertheless, the defendant, not regarding such his duty or his said retainer and employment, but contriving and intending to injure and aggrieve the plaintiff in that behalf, did not nor would use due or any diligence in and about the printing of the said work, and did not nor would proceed with the same with reasonable despatch, but, on the contrary thereof, greatly neglected the business of his said retainer and employment, and for a long period, to wit, for six months then next following, proceeded with the printing of the said work and publication in a dilatory and negligent manner: and the defendant also, further wrongfully and injuriously contriving to prejudice and aggrieve the plaintiff in that behalf, further disregarded his said duty and retainer, and deceived the plaintiff in this, that the defendant did not nor would use the said paper so furnished to him by the plaintiff in and about the printing of the said work, and did not nor would print the said work thereupon, but wholly neglected and refused so to do; and on the contrary thereof, wrongfully and injuriously, and without the license and against the will of the plaintiff, used divers large quantities, to wit, sixty reams of the same paper for other and different purposes than for the printing of the said work, to wit, for the private purposes, and for the use and benefit of the defendant only; and then wrongfully, and in violation of his duty in that behalf, pawned and pledged the said last

mentioned paper with divers persons to the plaintiff unknown, in order to raise money for the private purposes of the defendant : by means of which said several grievances, the plaintiff had not only lost and been deprived of the said last mentioned paper, but the publication of the said work was greatly delayed, and the same could not be and was not published until a very long and unreasonable time, to wit, six months, longer than that in which, but for the committing of the said several grievances by the defendant, the same might and otherwise would have been published ; whereby the sale of the said work was greatly diminished and curtailed, and the plaintiff lost and was deprived of the means of disposing of divers, to wit, 2000 copies thereof to divers persons who otherwise would have been purchasers of the same ; and the plaintiff had, by reason of the premises, lost and been deprived of divers large gains and profits, and had been and was otherwise injured and damnified.

Demurrer,—for that this action on the case was brought for the non-performance of a duty supposed to arise out of a retainer and employment, whereas the obligation, if any, to do the act for the nonperformance of which the action was brought, could only have arisen from some promise of the defendant ; and no promise was stated : that an action on the case does not lie for the nonperformance of a promise, or for the nonperformance of any duty but a public duty : that no such duty was averred on the part of the defendant ; nor was any such duty as that stated in the declaration to be inferred from the defendant's retainer and employment : that it was not averred that the defendant had been requested to publish the work in question : and that the defendant was not bound to print it on the identical paper delivered to him,—it was sufficient if he printed it on paper of as good a quality : that the declaration, as far as it referred to the user of the paper by the defendant, was only an informal and argumentative statement of a conversion, and of a cause of action in trover.

Joinder.

Channell, in support of the demurrer, admitted that the declaration could scarcely be impugned, if the Court were of opinion that a plaintiff may declare in case, where, after a contract set forth by way of inducement, he can show in his breach a distinct and substantive tort : and that principle seemed to be established by *Must v. Goodson*, 3 Wils. 348, where it was held, that a count upon an agreement in writing that the plaintiff should build a yard in the defendant's close, and lay out not less than 20*l.* thereupon, and that the plaintiff should enjoy it for his life, in which count the plaintiff averred that he did build the yard, &c., and enjoyed the same for some years as an easement, and assigned for breach that the defendant wrongfully and injuriously obstructed him in the enjoyment of his said easement,—might well be joined with a count in trover : and the Court said,—“ This is certainly a misfeasance, and sounds wholly in tort, force, and wrong, and not in contract ; for the agreement or contract which had been for some years before executed both by plaintiff and defendant, is only introductory to show the tort or wrong done by the defendant to the plaintiff in hindering him from the enjoyment of his easement, which he had an undoubted right to enjoy : so that we are of opinion the first

upon a tort, and not upon contract." *Samuel v.*
 was to the same effect. The breaches, here, how-
 evations of *nonfeasance*,—for the pawning the
 he defendant supplied other paper of as good
 were a positive act of *misfeasance*, the

the pawning the paper was a sub-
 might well declare in case, within

ver, but the precise form of
 of objection.

defendant for a speci-
 as lawful; but that,
 em, instead of applying
 aded.

application of these goods in an
 that a sufficient tort appears to
 demurrer is not sustainable.

ame opinion: although many of the alle-
nonfeasance, yet there is one which is sub-
 of tort, although connected with the contract.

, instead of applying the goods in the way required
 , applied them to his own purposes, he was clearly

, J. Though many breaches of the contract are alleged, the
 cation of the paper is clearly a tort, and would have been a
 cause of action even if there had been no contract. And though
 count simply stating that the defendant pawned the plaintiff's goods
 might have been open to the objection made here, that it was a round-
 about count in trover, yet as this declaration states that the goods were
 in the possession of the defendant by the act of the plaintiff, before the
 defendant pawned them, the objection cannot prevail. I think, there-
 fore, that the demurrer must be overruled.

Judgment for the plaintiff.

TINDAL, C. J. was absent at Monmouth.

COCKBURN and Another against WRIGHT and Others, Executors and Executrix of HENRY WRIGHT, deceased.—p. 223.

Under a charterparty defendant's ship was to proceed from London to Bombay, and there discharge her cargo; and then load a cargo, with which she was to proceed direct to London; the merchant to have the privilege of sending the ship to Calcutta from Bombay, upon paying for the extra time occupied. If the ship returned from Bombay direct to London, the merchant was to have the power of sending her to one port on the Malabar coast, to receive cargo, paying for the extra time: Held, that defendants, after discharging at Bombay, were not bound to take on board a cargo there for Calcutta.

THE declaration stated, that on the 25th of March, 1836, by a charter party of affreightment, made between H. Wright, deceased, as owner of the ship Bengal, and the plaintiffs, it was agreed that the said ship should with all convenient speed proceed to a loading berth in the London Docks, or so near thereunto as she might safely get, and there load from the factors of the plaintiffs a full and complete cargo of lawful merchandise, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded, should therewith proceed to Bombay, or so near thereunto as she might safely get, and deliver the same, and there discharge the same, and should then load a full and complete cargo of lawful merchandise, with which she should proceed direct to London, and discharge the same in such dock in the river Thames as the charterers might direct: in consideration of which the charterers engaged to pay to the said owner the sum of 2350*l.* in full, and in lieu of all port charges and pilotage; (the act of God, &c. excepted:) the freight to be paid, 300*l.* at two months' date from clearing outwards at the Custom House, London, and the remainder at two months' date from the delivery of the inward cargo: sixty running days to be allowed the merchant (if the ship were not sooner despatched) for loading the ship at Bombay, and ten days on demurrage, over and above the said laying days, at 6*l.* per day: penalty for nonperformance of the agreement, 2000*l.*: the ship to sail from London on or before the 1st of June: the merchants to have the privilege of sending the ship to Calcutta from Bombay, they paying at the rate of 17*s.* per register ton per month for the extra time occupied; the merchants also engaging to pay the ship's port charges and pilotage at Calcutta: if the ship returned from Bombay direct to London, the merchants were to have the power of sending her to one port on the Malabar coast to receive cargo, paying the ship's port charges and pilotage, and 17*s.* register ton per month for the extra time occupied.—Mutual promises.—Averments, that the plaintiffs paid the sum of 300*l.* in the charterparty mentioned, and were ready and willing to advance cash at Bombay according to the true intent and meaning thereof; that, on the 20th of May in the year aforesaid, the ship, having received a cargo on board according to the charterparty, proceeded to Bombay in the East Indies, arrived there, and delivered and discharged her outward cargo to the agents of the plaintiffs in that behalf: that the plaintiffs, afterwards, having procured a cargo of lawful merchandises in that behalf, within a reasonable time in that behalf, called upon and required the said H. Wright, deceased, to load the same on board the said ship, and proceed therewith to Calcutta, but the said H. Wright wholly refused so to do, though he was not prevented by the act of God, &c.: that afterwards the ship proceeded from Bombay to Calcutta without any

cargo whatever on board her, contrary to the tenor and effect of the charterparty, and the promise and undertaking of the said H. Wright so by him made: that by means of the premises, the plaintiffs had lost divers gains which they would have acquired by the conveyance of the said cargo from Bombay, and the sale and disposal thereof; and had been deprived of the benefit of the said charterparty, and the advantages which would have accrued therefrom.

Pleas,—First, the general issue: second,—that from the time of the arrival of the ship at Bombay, and the discharge of her outward cargo, as in the declaration mentioned, and from thence continually until the ship proceeded from Bombay, as therein also mentioned, the said H. Wright was ready and willing, and during that period, to wit, on, &c., tendered and offered to the plaintiffs to load and receive on board the ship a full and complete cargo of lawful merchandise, to be conveyed in the ship according to the charterparty, to wit, to London: that the cargo of lawful merchandise which the said H. Wright was in the declaration alleged to have been required to load on board the ship at Bombay, was to be conveyed to and discharged at a certain port or place other than London, or any dock in the river Thames, that is to say, Calcutta, contrary to the charterparty; and that, on that account, and no other, the said H. Wright refused to load the said cargo on board the ship. That from the time of the arrival of the ship at Bombay, and from thence continually until she sailed from Bombay, as in the declaration mentioned, the plaintiffs wholly neglected and refused to load on board the ship a full and complete cargo, or any part of a cargo, of merchandise to be conveyed to London, and there, or in any dock in the river Thames, to be discharged; and afterwards discharged the said H. Wright from any further detaining or keeping the ship at Bombay; wherefore the ship proceeded from Bombay without any cargo on board, in manner and form as the plaintiffs had complained; and that, the defendants were ready to verify.

Demurrer,—for that, by the terms of the charterparty, Wright was bound to load a cargo at Bombay at the request of the plaintiffs, without regard to his liability afterwards to carry the same to one place or another; and that he was bound to load a cargo at Bombay to be carried to the Malabar coast or to Calcutta, at the option of the plaintiffs.

Joinder.

R. V. Richards, in support of the demurrer, contended that the privilege reserved in the charterparty of sending the ship to Calcutta after she had discharged her cargo at Bombay, and if she returned from Bombay direct to London, the power of sending her to one port on the Malabar coast, implied that the plaintiffs should also have the power of sending a cargo from Bombay to Calcutta or the Malabar coast; it could never have been intended that the ship should make such intermediate voyage in ballast; if such an intention had existed, it would at least have been expressed. It was the usual course of the trade to make an intermediate voyage with a cargo from Bombay to Calcutta.

Bompas, Serjt., *contra*. The meaning of the parties was, that the ship should discharge at Bombay or at Calcutta, according to the option of the plaintiffs; and that, if she discharged at Bombay and returned direct to London, instead of discharging at Calcutta, the plaintiffs should have the option of sending her to one port on the Malabar coast. It was not intended that she should discharge first at Bombay, and then

take in an intermediate cargo for Calcutta, but merely that, if the merchant found no return cargo ready for him at Bombay, he should have the privilege of sending the ship on with her original outward cargo to Calcutta, there to be exchanged for a homeward cargo.

R. V. Richards, in reply, observed that, according to the language of the charterparty, the ship was at all events to discharge at Bombay: if so, it would have been useless to stipulate for the privilege of sending the ship on to Calcutta, unless she were to take a cargo from Bombay thither.

BOSANQUET, J. This is an action on a charterparty, of which the plaintiff alleges a breach; and if it has been broken, he must show that there has been a breach in the way he complains. By the charterparty it is stipulated, that the ship shall proceed from London to Bombay, and there discharge her cargo, and then load a cargo, with which she shall proceed direct to London; the merchant to have the privilege of sending the ship to Calcutta from Bombay, upon paying for the extra time occupied: and if the ship returns from Bombay direct to London, the merchant is to have the power of sending her to one port on the Malabar coast to receive cargo, paying for the extra time. The plaintiffs complain that the master was required to load a cargo at Bombay and proceed with it to Calcutta; that he refused to do so; and proceeded to Calcutta without a cargo. The defendants plead that the cargo which the master was required to load at Bombay was to be carried to a port other than London, that is, to Calcutta, contrary to the charterparty: that, therefore, the master refused to take the cargo on board.

On looking through the charterparty, I am unable to find any stipulation that the master should take on board a cargo destined for any place other than London, or any thing to authorize the employment of the vessel upon an intermediate voyage after her arrival at Bombay. Our judgment, therefore, must be for the defendants.

ERSKINE, J. I am of the same opinion. The first agreement is, for a voyage from London to Bombay and back; there is also a stipulation that the plaintiffs shall have the privilege of sending the vessel to Calcutta; but, taking the whole instrument together, it appears that two voyages only are contemplated, one out and one home; and not an intermediate voyage with a cargo from Bombay for Calcutta.

MAULE, J. Our judgment must be for the defendants. There is no express agreement to proceed from Bombay to Calcutta with a cargo: in order to support this action, it must appear on the charterparty, by necessary intendment, that there was a promise to do that which the plaintiff complains has been refused. If we could import into this case knowledge extrinsic of the statement on the record, namely, that Calcutta is in the East Indies, and that it is usual on the outward voyage to take in a cargo at Bombay to be discharged at Calcutta before the commencement of the voyage homewards, there might be some ground for the construction of the charterparty for which the plaintiff contends; but excluding any such extrinsic knowledge, there is no promise to be collected from the charterparty, such as the plaintiff insists upon.

Judgment for the defendants.

TINDAL, C. J., was absent at Monmouth.

CHARLES SEELY against ELLISON.—p. 229.

The Court refused to change the *venue*, in an action of assault, from Lincolnshire to London, on the ground that the circumstances of the assault had been much discussed in the local newspapers; that plaintiff and defendant were of opposite political parties; that plaintiff, after having lectured against the corn laws, had been placarded as the farmer's enemy; and that defendant was much connected with the magistracy and tory aristocracy of the country.

ASSAULT and battery. The plaintiff laid the *venue* in London.

The defendant having removed it to Lincolnshire, where the assault took place, the plaintiff obtained a rule nisi to restore the *venue* to London, on affidavits which stated that the plaintiff, a person of liberal politics, had been lecturing in the county of Lincoln against the corn laws; that the farmers and landowners were much irritated and prejudiced against him, and had upon sundry occasions uttered expressions of ill-will towards him; that upon a market day a board had been placarded in the city of Lincoln, "Beware of Charles Silly and Company, the farmers' enemies:" that the local newspapers had repeatedly discussed the particulars of the assault for which this action was brought;—(the paragraphs were all set out;)—that the defendant was a major in the Lincoln militia, much connected with the magistracy and tory or conservative aristocracy of the county; and that under these circumstances the plaintiff could not obtain an impartial trial in the county of Lincoln.

Goulburn, Serjt., showed cause on affidavits from several farmers and others, who denied that any such prejudice existed as the plaintiff alleged, or that he could not have a fair trial in the county of Lincoln, and stated that the discussions in the local newspapers had been begun by editors of the plaintiff's party, while the paragraphs in the defendant's favour, had only been inserted in answer to attacks made on him by the plaintiff's friends. He contended thereupon, that no case had been made out for trying the cause in London rather than in Lincolnshire, the discussion in the newspapers having been commenced by the plaintiff's party, and the feeling on the subject of the corn laws not being peculiar to Lincolnshire, or any other district. The defendant's connection with the magistracy and others could not affect the composition of the jury, and afforded no ground for the motion. (a)

Bompas, Serjt., in support of the rule, maintained that the Court would change the *venue* wherever the subject-matter of a cause had been so discussed in local prints as to render it probable that an impartial jury could not be had in the county where the cause of action arose. Here, there had not only been repeated discussions, but the plaintiff had been placarded in the city of Lincoln.

Bosanquet, J. I think the plaintiff has not shown sufficient reasons for bringing back the *venue* to London. This is an action of assault, for a personal injury not connected with any political meeting, or political feeling. It is stated, indeed, that the plaintiff and defendant are of opposite political opinions: but it is not because such may be the case, even in a county where there are strong opinions on the subject, that the trial of a cause is, therefore, to be removed to another county, particularly in the case of a county so extensive as Lincolnshire.

(a) See *Davies v. Lowndes*, 4 New Cases, 711, (33 E. C. L. R. 503.)

Reliance has been placed on *ex parte* discussions in the newspapers: but those discussions commenced with persons who were friendly to the plaintiff; they bear heavily on the defendant; the paragraphs on his side are merely of a defensive nature; and I cannot think that the plaintiff can take advantage of such a circumstance to change the *venue*. The remaining circumstance relied on is the placard in the market at Lincoln; but as the defendant is not shown to have had any connection with that, I think this rule must be discharged.

ERSKINE, J. The defendant is entitled to retain the *venue* in Lincolnshire, unless a fair trial cannot be had there. The plaintiff is to establish that. He alleges that he has taken part against the corn laws, and that the farmers are against him; but it is a novel ground for changing the *venue*, that the plaintiff has taken one side of a public question, and other persons in the county have taken another. The defendant is not shown to have been concerned in the exhibition of the placard, and as to the discussions in the newspapers, they are such as take place upon almost every fact of local interest.

MAULE, J. I think the *venue* ought to remain in Lincolnshire. It is very likely the plaintiff thinks that great prejudice exists: it is not an uncommon thing for parties to have an exaggerated notion of the attention paid to their own cases, or for newspaper editors to attach an overestimate to the effect produced by their own paragraphs: but I can see no ground for supposing the plaintiff cannot have a fair trial in Lincolnshire, and, therefore, this rule must be

Discharged.

TINDAL, C. J., was absent at Monmouth.

In the Matter of the Serjeants at Law.—p. 232.

TINDAL, C. J., who had been occupied under a special commission in the trial of Frost and others for high treason at Monmouth, this day resumed his seat on the bench, and, after calling on the serjeants at law, in succession, to move, abstained from calling on the apprentices.

At the close of the day's sitting,

Newton (an apprentice) said he had hoped that some gentleman of rank and experience would have stood up to advocate the rights of the bar; but, seeing that such was not the case, he begged that he might be permitted to address the Court in defence of his own right at any time the Court would appoint, as he was not at that moment prepared.

TINDAL, C. J. I gave notice last term, that in case any gentleman not of the degree of the coif should be present on my return to the court this term, I should not call on him to move; but that if any gentleman so passed over should be desirous of making any observations on the subject, we should be willing to hear him. You should have been prepared after that notice: we are willing to hear you now.

Newton then said that he would take this opportunity of addressing a few observations on the subject of the course of proceeding which their lordships had thought proper to adopt. It appeared that the serjeants had long enjoyed the exclusive privilege of pleading and audience in this court until the year 1834, when the late sovereign issued a warrant for opening the court to all the members of the English

bar. That warrant was received by their lordships, and ordered to be filed amongst the records of this court; and in obedience to it their lordships had extended the privilege of pleading and audience to the general body of the bar. The learned serjeants had acquiesced in that proceeding, and never questioned its legality during the lifetime of the sovereign who had issued the warrant; but some time after a new sovereign had ascended the throne, they thought proper to prefer a petition to the privy council, or rather a petition to the queen, which her majesty referred to her privy council, praying that the warrant of her royal predecessor might be revoked. This petition had not succeeded. The serjeants then procured a bill to be introduced into parliament for the purpose of closing the court to barristers at large: Mr. Serjeant *Wilde* had stated that this bill had been introduced into parliament for the purpose of opening the court; the fact was, that the court being open at the time, the bill was introduced for the purpose of closing it to the bar. It passed the House of Lords: but not one member of the popular branch of the legislature could be found who would take it up; not even a serjeant or any other member of the profession; and it was suffered to fall to the ground, without even being negatived by a vote of the House, the legislature thus evincing their feeling that the interests of the public did not call for the closing of this court. Mr. Serjeant *Wilde* next, on behalf of the serjeants, called upon their lordships to do that of their own authority which the legislature had refused to pass a law for doing. The learned serjeant had contended that the crown had no power to issue a warrant which interfered with the privileges of the serjeants; by what authority, then, was it that these learned gentlemen claimed to be entitled to those privileges? By virtue of the royal warrant or mandate by which they were raised to the degree of the coif. [TINDAL, C. J., observed that a serjeant was not appointed by either warrant or mandate, but by writ.] Whether they were appointed by mandate or writ, in either case they derived their appointment from the supreme executive power; and that same authority had an equal right to empower other members of the bar to enjoy equal privileges. The royal warrant was of as much force in authorizing barristers to practise in this court as the royal writ which constituted certain members of the profession serjeants at law. With respect to those gentlemen who had been called to the bar when the right of pleading and audience in this court was open to all the bar, the step now taken towards closing the court would be particularly unjust, because many of those gentlemen might have pursued that peculiar course of study which was calculated to qualify them for practising in this court, and it would be very hard upon them, after having bestowed time and expense upon the acquirement of such qualification, if they were to be debarred from availing themselves of the fruits of it. He would not make any observations on the advantage or disadvantage of preventing the suitors from selecting their advocates from the whole body of the English bar; he would not say that it might not be for their interest that they should be confined in the selection of their advocates to the serjeants alone, as being a set of gentlemen in every way superior in talents, learning, and experience to the remainder of the bar, not even excepting her majesty's counsel, or the law officers of the crown; but it did seem that her majesty was not advised that it would be to the interest of the suitors in this court so to limit their

choice of advocates; and it also seemed as if the legislature had not so deemed it, for they also refused to impose any such restriction. It had been argued by Mr. Serjeant *Wilde*, that if her majesty could be supposed to have the power of opening this court by her warrant to the practice of the whole bar, there was no reason why she might not issue her warrant to open it to the public at large. But, in the first place, it was never to be presumed that the sovereign would make an unwise or improper use of any power which she possessed; and, secondly, there was nothing advanced by the learned serjeant to show that she had not such a power, and might not give authority to any friend of a suitor to act as that suitor's advocate. He had small hopes that any thing he could urge, particularly without opportunity for preparation, would have any weight with their lordships; but he could not help calling upon their lordships to pause before they finally resolved upon doing that of their own will which both the executive and the legislature had, out of regard to the interests of the public, refrained from doing.

TINDAL, C. J. Your observations, sir, are extremely proper, and shall receive all due consideration at our hands.

In the Matter of the Serjeants at Law.—p. 235.

THIS day, the reasons for restoring to the serjeants at law the exclusive right to practise in this court were stated as follows, by

TINDAL, C. J. A question has been raised before us as to the validity and legal effect of a warrant, (a) under the sign manual of his late majesty—the warrant itself being subject to some exception in point of form, to which, however, it is unnecessary further to advert—ordering and directing that the right of practising, pleading, and audience in the Common Pleas during term time, should, from the first day of Trinity term, 1834, cease to be exercised exclusively by the serjeants at law; and that, upon and from that day, the barristers at law might have and exercise equal right and privilege of practising, pleading, and audience in the said court with the serjeants at law: and we have been called upon by such of the learned serjeants as have joined in the application, to declare our opinion upon a question which affects so nearly their interests, and to act upon that opinion.

At the time when this warrant from his late majesty was openly read in court, in the presence of all the serjeants, if any one of our learned brethren had expressed a doubt as to its validity or legality, and had called for the opinion of the Court upon that point, we should have felt it our duty to have paused before we gave effect to the warrant, and should have given our deliberate opinion upon the objections which might have been urged in argument against it. But no doubt whatever was then suggested: indeed, the larger number of the serjeants accepted under the warrant the grace and favour of the crown in giving them permanent rank, with respect to any gentleman who should be afterwards appointed king's counsel; and those of our brethren who had previously obtained permanent rank from the crown, and who are the only parties to this present application, allowed the matter at that time to pass *sub silentio*. Under these circumstances it

(a) See 10 Bingh. 571.

cannot be matter of surprise that the Court did not, of its own authority, interpose any objection to the warrant; the more especially, as the object which the warrant had in view—that is, the opening of the Court of Common Pleas—was that which the common-law commissioners had, by their report, previously recommended to be adopted for the benefit of suitors; though certainly with a much closer limit as to extent than the warrant directs.

Still, however, notwithstanding the period of acquiescence under the operation of this warrant has been considerable, we see no legal ground upon which those who have joined in this application can be held barred of their right to call for the opinion of the Court upon the validity of the warrant: and we think ourselves bound in the execution of our duty, of administering justice to all, not only to the suitors of the court, but to the officers and members of the court, to declare our judgment upon the effect and validity of the warrant in question, when called upon so to do.

Now, we think the question before us turns upon the single point, whether the serjeants at law have, by the constitution of the court, and consequently by law, held and enjoyed the sole and exclusive privilege, by virtue of their office or degree of serjeant, of practising, pleading, and audience in the Court of Common Pleas; for if they are so entitled, we think they cannot be deprived of it by a warrant from the crown under the sign manual, nor, indeed, by any power short of an act of the whole legislature.

That the antiquity of the state, degree, and office of a serjeant at law, is as high, at the least, as the existence of the court itself, is evident from all the text writers and records which bear upon the point. The serjeants are mentioned in the "Mirror of Justices," a book of great authority, and of the earliest, though uncertain date: by Bracton who wrote in the time of Henry III.; and in records which are to be found in the Tower in the time of Edward I. They are called to the state and degree of serjeant *by writ*: which of itself is a strong argument of the antiquity of their office, the form of such writ being found in the most ancient manuscript registers, in substance the same with the writ by which they are called to that degree at the present day. By their oath of office, which has existed from the earliest time—an oath by which no other barrister is bound to give attendance in any particular court—they bind themselves "to give due attendance for the service of the king's people in their causes." As early as any authentic records exist, the serjeants are found to be practising in the Court of Common Pleas; and there is no evidence of any other barrister being allowed to practise, or practising in that court. (See the various authorities collected on the speech of the Lord Commissioner WHITLOCKE, to the newly-created serjeants, in his "Memorials," page 356.)

We, therefore, think ourselves justified in saying that, from time immemorial, the serjeants have enjoyed the exclusive privilege of practising, pleading, and audience in the Court of Common Pleas. Immemorial enjoyment is the most solid of all titles; and we think the warrant of the crown can no more deprive the serjeant who holds an immemorial office of the benefits and privileges which belong to it, than it could alter the administration of the law within the Court itself. The rights and privileges of the serjeant, and rights and privileges of

the peer of the realm, stand upon the same foundation, immemorial usage.

We hold, therefore, that the right of the serjeants to the sole and exclusive privilege, which they claim, is still in existence, notwithstanding the king's warrant; and we feel ourselves bound, in the due course of administering justice, to allow such right to be still exercised.

Extreme cases may certainly occur, in the progress of time, under which the Court might be called upon, for a time at least, to admit others to plead and practise within it, until the circumstances which created such necessity had passed over, and this, in order to prevent a failure in the administration of justice to the queen's subject, for which end all courts of justice were instituted. *LITTLETON, J.*, in the case of *Parton v. Genny*, serjeant at law, Trin. 2 Ed. 4, fol. 2, pl. 4, says, "If all the serjeants were dead, we could hear the apprentices to plead here by necessity, and in ease of the people." To which *BRITAN, C. J.*, answers, "Then, according to you, no serjeant shall be made for necessity," &c.

And it appears to us, upon the present occasion, that as the serjeants have by their own voluntary acquiescence, under the supposed legality of a warrant which they now dispute, induced suitors of the court to retain as counsel in their causes, in this court during term time, barristers who are not of the degree of the coif, it would be against reason and justice that such suitors should not have the full benefit of the services so engaged by them.

Whilst, therefore, we declare our opinion to be, that, under the present constitution of the court, we ought to allow the serjeants the exclusive liberty of practising, pleading, and being heard in this court during term time, it is with this reserve,—that all barristers not being of the degree of the coif shall be heard in the business of the suitors in which they are at present engaged, until the same be fully despatched and brought to an end. (a)

(a) During the delivery of the above, a furious tempest of wind prevailed, which seemed to shake the fabric of Westminster Hall, and nearly burst open the windows and doors of the Court of Common Pleas.

LEGGE against BOYD.—p. 240.

In May, 1837, plaintiff and defendant exchanged cases for the opinion of the Court, in an action in trover for certain tobacco. The questions were, whether plaintiff had tendered a proper amount of duty to the customs, and whether this action lay against defendant, a collector of customs. The same question being raised in another action then pending in the Court of King's Bench, plaintiff suspended proceedings till the decision of that cause in Trinity term, 1839: and that Court having determined that the action should be conceived in case for nonfeassance, and not in trover, plaintiff, in Michaelmas term, 1839, applied to amend by substituting a count on a nonfeassance for his count in trover. The Court allowed the amendment.

SOME damaged tobacco belonging to the plaintiff being lodged in the custom-house in London, a question arose between the plaintiff and the defendant, who was the collector of the customs at the port of London, as to the amount of duty payable in respect of the tobacco.

The plaintiff tendered a certain sum, which the defendant thought insufficient, and therefore refused to sign a warrant for the delivery of the tobacco, which was in the possession of another officer of the customs,

and could only be obtained on the production of a warrant signed by the defendant.

The plaintiff thereupon commenced an action of trover against the defendant on the second of January, 1837.

The six months within which he was limited to sue under 3 & 4 W. 4, c. 53, s. 107, expired on the 10th of February, 1837.

The defendant consented to make an admission of the facts necessary to raise the question of law as to the amount of the duty, and a case for the opinion of the Court was exchanged between the parties on the 13th of May, 1837, in which the questions were, whether, under the circumstances stated, the plaintiff had tendered the proper amount of duty; and whether the defendant was liable to this action.

At that time the same question was pending in a cause of *Barry v. Arnaud*, in the Court of Q. B., and the plaintiff in this action suspended proceedings till the decision in *Barry v. Arnaud* should be pronounced.

Judgment was given in that cause for the plaintiff, on the last day of Trinity term, 1839, and it was determined, among other things, that the action was properly brought in case for non-feasance, and not in trover: whereupon, after application made to a judge, who referred the applicant to the Court,

Martin, in Michaelmas term, obtained a rule *nisi* to amend the declaration in this cause, by substituting for the count in trover a count in tort for a non-feasance.

Spankie, Serjt., and *T. F. Ellis*, who showed cause, contended that the parties having exchanged cases with a view to argument so long ago as May 1837, in which cases one of the questions was whether the action of trover lay, it was now too late to ask for this amendment, which in effect set up a new cause of action. In *Green v. Mitton*, 4 B. & Adol. 369, (24 E. C. L. R.,) the plaintiff commenced his action in Hilary term, 1831, and declared in trover: the parties went to issue, and the plaintiff was put under a peremptory undertaking to try: in Michaelmas term 1832, having been advised that the action was misconceived, he moved for leave to substitute a count in detinue for that in trover, and to add one in debt; and it was sworn that no new ground of action was contemplated; but the Court refused the application. So, in *Cross v. Metcalf*, 5 Adol. & Ell. 800, (31 E. C. L. R.,) a cause was referred at *Nisi Prius*, and a verdict taken for the plaintiff, subject to a reference: the arbitrator certified to the Court, pending the reference, that it would be agreeable to the justice of the case to allow the plaintiff to amend his replication by substituting *de injuria* or some other replication, which should put in issue all the allegations in the plea: but it was held, that such amendment could not be ordered without the consent of both parties. In *Conolly v. Finch*, 2 Chitty's Archbold's Pr., 7th ed. 1121, the Court of Exchequer, in an action for false imprisonment, refused to allow a count *de bonis asportatis* to be added to the declaration after the lapse of two terms.

And the Court would not be induced to allow the amendment on the ground that, if it were refused, the plaintiff's claim would be barred by the clause of limitation:—*Roberts v. Bate*, 6 Adol. & Ell. 778, (33 E. C. L. R.,) and the cases there cited.

Martin, in support of the rule. The present case is distinguishable from those referred to, on the ground that the plaintiff has waited for the decision of the Court of Queen's Bench on a similar question. That decision might have rendered the application unnecessary; the plaintiff

was justified in suspending his proceedings; and, therefore, his application stands on the same footing, as if it had been made in May 1837. It was true that cases had been then exchanged; but the plaintiff sought to add no new fact, nor any fresh cause of action.

In *Green v. Mitton* the plaintiff was under a peremptory undertaking to try; and in *Cross v. Metcalf* a verdict had been taken. But in *Jones v. Edwards*, 3 Mees. & Welsb. 218, the Court allowed the declaration in a penal action (against a magistrate for acting without a qualification) to be amended after special demurrer, on the terms of the defendant's pleading *de novo*, and the plaintiff's undertaking to try at the next assizes; although the declaration had already been once before amended on the plaintiff's application, and although the defendant produced affidavits that the plaintiff was a person in indigent circumstances, and that he (the defendant) was advised and believed that he had a good defence on the merits.

And if the Court has on some occasions refused to allow an amendment sought for with a view to retrieve a claim which would otherwise be barred by the Statute of Limitations, it has upon other occasions permitted amendments which have in effect deprived the defendant of the advantage of pleading the statute. *Aylwin v. Todd*, 1 New Cases, 170, (27 E. C. L. R.,) *Horton v. Inhabitants of Stamford*, 1 Cr. & Mee. 773, *Lakin v. Watson*, 2 Cr. & Mee. 685, *Maddock v. Hammett*, 7 T. R. 55, *Cross v. Kaye*, 6 T. R. 543, *Steel v. Sowerby*, 6 T. R. 171.

TINDAL, C. J. I have entertained a doubt, in the course of the argument, whether we ought to yield to this application: and my doubt rests upon the ground that from the question raised at the end of the case drawn up for the opinion of the Court, the plaintiff might have discovered his error so long since as the 13th of May, 1837, and should have made earlier his application to amend: but as there was a case on which the same point was depending in the Court of Queen's Bench, and as that case was not determined till last Trinity term, I think we are warranted in acceding to the application: but I do so, without giving any opinion on the question as to the clause of limitation.

BOSANQUET, J. I concur with my Lord; but I beg to be understood, not on the ground that the plaintiff's claim would be barred if the amendment were refused. It is a strong thing to allow a plaintiff, after such a lapse of time, to adapt his declaration to a state of facts with which he was acquainted from the beginning. However, as there is no alteration of the writ, and as there was a case pending in the Court of Queen's Bench which left this point undecided, and parties may be still under some difficulty as to the operation of the new rules, I think the amendment should be allowed.

ERSKINE, J. After the delay which has occurred, I yield to this application with reluctance.

MAULE, J. I concur, on the ground that if the application were refused, the plaintiff would be without remedy. It is a strong thing, where a clause of limitation might apply, to alter the form of the writ, or to add a new party: but here the plaintiff seeks only to alter the form of his declaration without altering the writ or adding any new party, or fact, or cause of action; and the limitation of the time for suing is confined to the short space of six months after the act complained of. *Doe dem. Skelton v. Skelton*, 3 Adol. & Ell. 265, (30 E. C. L. R.,) is the converse of this case. There, a verdict was taken for the plaintiff in ejectment, subject to a special case, which stated that it

was "the custom in the manor" in which the premises in question, being copyhold lands, were, that where a copyholder, being a feme covert, surrendered, if the husband consented to the surrender, such consent should be expressed in the surrender and admission; and that without his consent the surrender was inoperative: the Court refused to amend the case at the instance of the plaintiff alone, by the judge's notes, so as to limit it to a mere statement, that the common practice was to enter the consent in the surrender and admission. Here, there is no application to amend the state of facts which the parties agreed to in May 1837, but to adapt the declaration to the state of facts agreed to. All we decide, is, that the question intended to be raised by the parties shall not be refused a trial, because the plaintiff has by mistake framed his declaration in trover, instead of tort for a nonfeasance.

Rule absolute.

DORRIEN against HOWELL.—p. 245.

A cause in which counsel had been instructed for defendant, having been called on out of its turn, upon an allegation of plaintiff's counsel that it was undefended, a verdict was taken for plaintiff before defendant's counsel arrived.

The Court granted a new trial; the costs of the application to abide the event of the cause.

THIS cause stood tenth upon the list for the day at Nisi Prius, and the defendant's attorney had delivered a brief to counsel. As soon as the Court sat, and before the defendant's counsel had arrived, the plaintiff's counsel alleging that the cause was undefended, it was called on out of its turn; and no one appearing for the defendant, a verdict was taken for the plaintiff; which

Bompas, Serjt., obtained a rule *nisi* to set aside, on the ground that the cause had been improperly called on before its turn. There was no affidavit of merits.

Bramwell, who showed cause, referred to *Fourdrinier v. Bradbury*, 3 B. & Ald. 328, (5 E. C. L. R. 307,) where it was held that the fact of a cause being in the written list at Nisi Prius, was notice to the attorney that it might be tried at any time in the course of the day; and, therefore, where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the Court granted a new trial only on payment of costs. In that case there were thirty causes before the one taken out of its turn. In *Blackhurst v. Bulmer*, 5 B. & Ald. 907, (7 E. C. L. R. 298,) where a cause stood in the paper below the last cause mentioned in the written list affixed at the outside of the court, and was tried, (being stated to be an undefended cause,) the counsel for the defendant objected to it, and declined to appear: it was held that the trial was regular, and the Court refused a new trial, there being no affidavit of merits. So, in *Bland v. Warren*, 7 Adol. & Ell. 11, (34 E. C. L. R. 16,) where the marshal entered a cause as undefended for the day on which undefended causes were taken, in Middlesex, it was held, that the defendant, if he meant to defend it, must instruct counsel to appear on that day, and state that it was defended; or, at any rate, must give the plaintiff notice to that effect. In default of that, if the plaintiff tried the cause as undefended, and obtained a verdict, the defendant, though upon affidavit of merits, would be allowed to set the verdict aside only on payment of costs. In *Aust v. Fenwick*, 2 Dowl. 246, where the

Court allowed the costs in such a case to abide the event, the cause had been taken during the casual absence of the defendant's attorney. Here, he was not ready on the day appointed, and therefore the rule could only be absolute on payment of costs.

Bompas, Serjt. The plaintiff's counsel here asserted that the cause was undefended when the fact was otherwise. There was no such proceeding in any of the cases cited, and the defendant ought not to pay costs occasioned by such a mode of proceeding, which, if countenanced, would be productive of general inconvenience.

Per Curiam. Let the cause be set down for trial again, the costs of this motion to abide the event of the cause.

Rule absolute accordingly.

JONES against CORRY and Others, Executors of WILKINS.—p. 247.

In 1835, plaintiff sued defendants, as executors, for work done on a house of their testator, and delivered his particulars in July, 1837, after he had commenced a second action against them in their own capacity for work done to the same house after testator's death: both actions were referred to arbitration, and an award made was set aside in Hilary term, 1839: plaintiff having abandoned his second action, was allowed, in Trinity vacation, 1839, to amend his particulars in the first by adding to them certain items which had been contained in the particulars of the second.

THE testator died in May, 1831, and probate was granted to the defendants in June following.

In 1835, the plaintiff commenced this action against the defendants, as executors, for the amount of a mason's bill, in respect of work done to the testator's house in the time of the testator.

The declaration and particulars of demand were delivered in July, 1837, after the plaintiff had commenced a second action against the defendants, in their own capacity, for work done on the house in question between May and September, 1831.

The first cause—in which the defendants pleaded payment—came on for trial at the Spring assizes, 1838, when a verdict was taken for the plaintiff for the damages in the declaration, subject to the award of an arbitrator to whom that cause, and the other, and all matters in difference between the parties and the heir of the testator (who became a party to the arbitration), were referred.

The award made having been set aside in Hilary term, 1839,—see 5 New Cases, 187,—it became necessary for the plaintiff to proceed anew with the first action. The second action being untenable, was abandoned.

Neither the architect nor the clerk of the works employed on the testator's house, had been examined before the arbitrator, and the plaintiff not knowing with precision what portion of the work had been done before the testator's death, and what after, in July, 1839, obtained an order from Lord DENMAN, for amending his particulars in this action, by adding certain items to the amount of about 150*l.*, which had formed a portion of the particulars in the second action. By this means he proposed to cover the whole of any work which, from the testimony of either of those witnesses, might unexpectedly appear to have been done in the testator's lifetime.

In Michaelmas term a rule *nisi* was obtained to rescind the learned judge's order, on the ground that the plaintiff could not be allowed to amend his particular so long after the action commenced.

E. V. Williams, who showed cause, contended that the amendment would not put the defendants to any inconvenience, or call on them to answer any demand they ought not to pay. Their object in seeking to rescind this order, was to drive the plaintiff to commence a new action, to which they would plead the Statute of Limitations. That was an object in which the Court would not assist them. *Taylor v. Lyon*, 5 Bingh. 333, (15 E. C. L. R.) [MAULE, J., referred to *Staples v. Holdsworth*, 4 New Cases, 717, (33 E. C. L. R.,) where, in an action for money had and received, the plaintiff was allowed, after suspension of proceedings for ten years, occasioned by the absence of the plaintiff beyond seas, to amend his particulars, by the insertion of fresh items, discovered after the defendant's account had been rendered.]

Kelly and Powell, in support of the rule.

In *Staples v. Holdsworth*, the plaintiff had framed his particulars from an account rendered by the defendant, who had misled him. What the plaintiff here requires, is indirectly to have the benefit of bringing a new action: after such a lapse of time, the defendants might laudably resort to the Statute of Limitations as an answer to such an action, and the Court ought not to deprive them of that advantage by acceding to the present application.

TINDAL, C. J. I think this rule ought to be discharged. The Court ought not to set aside the order of a learned judge without a clear ground for doing so, and I think no such ground has been shown. The plaintiff, in the year 1835, commenced his action against the defendants, as executors, for work done to a house of the testator: that action prevented the Statute of Limitations from affecting his claim. He afterwards brought an action against the same defendants in their own capacity for work done after the testator's death; and that action he finds to be not tenable. The bill of particulars in the first action was delivered after he had made that mistake. Having now discovered that the second action is not tenable, he wishes to add to the particulars of the first action a portion of the subject-matter of the misconceived action: I do not see what inconvenience that can occasion to the defendants, or what reason it can furnish for setting aside the judge's order.

BOSANQUET, J. If both the actions had gone on, the plaintiff expected to recover the whole of his demand in one or the other: he finds that he is in a mistake as to the second action, and he desires to insert in his particulars of the first, enough of the items from the particulars of the second to secure him for all the work done in the lifetime of the testator. The defendants are not taken by surprise, for they were well acquainted with the nature of the claim; and as it is the last portion of the work done which the plaintiff seeks to introduce, the case has no resemblance to an application by which a party seeks to introduce items which would otherwise be barred by the Statute of Limitations.

ERSKINE, J. I agree in thinking that no sufficient cause has been shown for setting aside this order: the plaintiff does not seek to add any new cause of action, but in making up his particulars having inserted less than he thinks he shall be able to prove, he seeks now to introduce the whole of the items for which the defendants may be liable. As to the objection that the defendants would be able to plead the Statute of Limitations to a fresh action, and that therefore the plaintiff ought not to be allowed to include the whole of his demand in this, the Courts have allowed amendments to prevent the Statute of Limitations from attaching, but I never heard of their refusing an amendment in order to

give effect to that statute. It is no answer to the application for amendment, that the plaintiff sought to recover the same items in another action which was found not to be tenable. The rule, therefore, for rescinding the order to amend must be discharged.

MAULE, J. The right to amend should be more indulgently viewed, where the Statute of Limitations is likely to apply. Here it is out of the question, the plaintiff having sued out his writ in good time. I think, therefore, that the order to amend is right. The plaintiff having mistaken his second action, wishes now to have a wider scope for the first: that is reasonable, and this rule must be Discharged.

TILLEARD and Another against CAVE.

FORD against CAVE.

ELLICE against CAVE.—p. 251.

Plaintiff was allowed to amend an order for interpleading obtained from a judge at chambers, on payment of the costs of the application to amend, to all the parties interested, served with the rule *nisi* for the amendment; but the order for interpleading having been obtained by the sheriff in his own ease, and the rule for amendment being no more than a prolongation of the hearing before the judge at chambers, the Court refused the sheriff his costs of appearing on that rule.

UNDER a *fi. fa.* issued in the first of the above actions, and endorsed to levy 107*l.* 11*s.* 8*d.*, the sheriff of Cornwall, on the 25th of August, 1839, took possession of certain goods and chattels on certain mines in Cornwall: on the 31st he received notice from several claimants that the goods and chattels seized belonged to them, and not to the defendant; whereupon

The sheriff took out a summons calling upon the claimants to show cause why they should not state the value and particulars of their claims, and maintain or relinquish the same.

This summons was served upon the claimants, who attended before a judge at chambers, when it was ordered that they and the plaintiffs in all the three actions should attend before him on a subsequent day.

They all attended accordingly, and, on the 8th of October, MAULE, J., ordered, by consent, that actions of trover should be brought, in which the claimants should be the plaintiffs, and Tilleards the defendants, to try the right to the goods in question; that the Tilleards should admit a conversion; that the costs of the actions should be in the discretion of the Court; that the sheriff should quit the possession of the goods, and be at liberty to apply to the Court for the costs of possession.

The conflicting interests, however, being very complicated, the learned judge recommended an application to the Court: whereupon, the demand of the plaintiffs in the first action being little more than 1000*l.*, which the ore at the surface of two of the mines was sufficient to cover, while the whole of the mines seized under the execution, and the demands of the various claimants, amounted to more than 50,000*l.*, the plaintiffs in the first action obtained, in Michaelmas term, a rule *nisi* to rescind the judge's order of the 8th of October, and for one of the claimants in occupation of a particular mine to account for the value of the ore seized, up to the amount of the levy under the *fi. fa.*, or to amend the order by directing an issue whether, at the time of the delivery of the writ, the goods claimed by the claimants, or so much of them as would satisfy the levy, were not liable to be seized under the writ.

This rule was served on the sheriff, on the plaintiffs in the second and third actions, and on all the claimants.

The parties all appeared by counsel, to vindicate their several interests, and the rule for amending the issue was only made absolute upon paying them the costs of such appearance.

Butt applied for costs on behalf of the sheriff also, for appearing on this rule; but

The Court considering the discussion upon this rule as no more than a prolongation of the discussion before the judge at chambers, which had been provoked by the sheriff himself, and was in his own ease, refused him any costs upon this rule. The costs of keeping possession from the 25th of August to the 8th of October they reserved for a future application, according to the terms of the judge's order.

LOHMANN against ROUGEMONT and Another.—p. 253.

Defendants, merchants in London, received orders from G. at St. Petersburg for a quantity of Havannah sugars: that order was revoked, and another given for Brazil sugars, for the amount of which defendants were to draw on plaintiff, G.'s agent at Hamburg, by a bill at three months: plaintiff accepted the bill: wrote to G. for instructions because defendants had been accredited for Havannah sugars and not Brazil; and then to defendants to say that he had accepted the bill under their guaranty for the present, as he had not received the accreditive: G. then wrote to plaintiff, giving him credit for the Brazil sugar, and requesting him to release defendants from their guaranty: G. failed before the acceptance became due: Held, that plaintiff was liable to defendants on this acceptance, notwithstanding defendants, after G.'s failure, wrote to plaintiff,—“We have received from G. the assurance that he has arranged with you the needful for the protection of the draft: we reserve to ourselves any advantage from the insurance of the goods; if you have written to G. that you have not honoured the draft, we cannot consider your acceptance as valid in any other way than on account of G.”

In this action for money had and received, and on an account stated. a verdict was found for the plaintiff for 639*l.* 8*s.* 2*d.*, subject to the opinion of the Court on a case which stated, in substance, that

The plaintiff was a merchant at Hamburg: the defendants, merchants in London, were in the habit of executing shipping orders for Guichart of St. Petersburg, and of drawing, for their reimbursement, upon the plaintiff, with whom credit was opened by Guichart, to meet the defendants' drafts.

On the 21st of August, 1835, Guichart ordered the defendants to ship for him fifty cases of white Havannah sugars, and to draw on the plaintiff for the amount. On the 1st of September he desired this order to be annulled if not then executed: and it never was executed.

On the 8th of September, Guichart ordered the defendant to ship twenty cases of Brazil sugar, and to draw on the plaintiff for the amount.

On the 6th of October, the defendants shipped for Guichart twenty cases of Brazil sugar, of which they advised him, and sent a duplicate of the bill of lading to the plaintiff, drawing on him at the same time at three months for 7449 marcs banco, “at the debit of their friend in St. Petersburg, who gave them orders to that effect,” and leaving the plaintiff to effect the insurance.

The bill was presented to the plaintiff at Hamburg on the 19th of October, and returned “accepted.”

On the 21st the plaintiff wrote to Guichart,—“I have received bills

of lading from Rougemonts, of twenty cases of Brazil sugar; I have effected insurances on them, for which you will credit my account: I accepted provisionally, because you accredited those friends with an order for Havannah sugars, and not Brazil, and I require your instructions."

On the 23d, one post to London having left Hamburg since the acceptance, the plaintiff wrote to the defendants,—“Your draft of the 6th I have accepted for the present under your guaranty, as I have not yet received the accreditive.”

On the 30th Guichart wrote to the plaintiff,—“Your favour of the 21st conveys to me insurance accounts for twenty cases of Brazil sugar (for which you are credited,) and advice of Rougemonts’ draft on you for the amount of the said sugars, which I request you to pay on my account, and to release the said friends from their guaranty: the credit opened with you for fifty cases of white Havannah sugar, I request you to consider as cancelled. I send you remittances.”

On the 6th of November, the defendants wrote to the plaintiff,—“We notice that you had the kindness to accept for the present under our guaranty our draft on account of Guichart, but have no doubt that he will confirm the same for his account.”

On the 20th of November Guichart stopped payment.

On the 1st of December the defendants wrote to the plaintiff,—“Since our last of the 6th of November we are without your favours, and therefore without advice of your having acknowledged, for account of Guichart, our draft which you had accepted under our guaranty: we have in the mean time received from Guichart the assurance that he has arranged the needful with you for the protection of the draft. We reserve to ourselves the rights to any advantage which may accrue from the insurance policies for the owners of the goods.”

On the same day the plaintiff wrote in a letter to the defendants, which crossed the foregoing on its passage,—“I cannot release you from your guaranty for the draft drawn upon you on account of Guichart: I shall not pay the same for Guichart, but request you to make me the necessary reimbursement.”

A duplicate of this letter was sent on the 4th, when the defendants’ letter of the 1st arrived.

On the 11th the defendants wrote to the plaintiff,—

“We find it singular that Guichart in his letters does not allude to the circumstances that you had not honoured this draft, so that he evidently takes it for granted that it has been acknowledged by you at his debit: if you have written in that sense to Guichart, we cannot consider your acceptance as valid in any other way than for the account of the latter.”

On the 15th the plaintiff made answer,—“The matter is simply this, that in order not to dishonour your signature, I accepted this draft under your guaranty, and have not released you from the same; consequently, you are bound to make the reimbursement, as debtors in your own name.”

When the bill became due, the plaintiff paid it with a protest, under the indemnity, and professedly on account of the defendants.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover from the defendants the amount so paid.

W. H. Watson, for the plaintiff.

The defendants shipped sugars for Guichart at St. Petersburg, for which they were to be paid by a bill on the plaintiff, Guichart's agent at Hamburgh: the plaintiff accepted the bill, but by his letter of the 23d of October, informed the defendants that he accepted only under their guaranty, not having then received the accreditive of Guichart; and that accreditive he never received, for Guichart became bankrupt before the bill was due: when, therefore, the plaintiff paid it, the amount was received by the defendants to the plaintiff's use: this is, in effect, admitted by the defendants in their letter of the 11th of December. "Guichart in his letters to us does not allude to the circumstance that you had not honoured his draft; but if you have written in that sense to Guichart, we cannot consider your acceptance as valid in any other way than for the account of the latter."

Shee, for the defendants. The acceptance on the face of the bill was unqualified: the bill was returned on the 19th of October, accepted generally: the plaintiff, therefore, could not afterwards qualify it, by alleging, in a letter on the 23d, that he accepted it only on the defendants' guaranty till he received the accreditive from Guichart. Assuming, however, that he could do so, then, he received the accreditive by Guichart's letter of the 30th of October. By "*receiving the accreditive*," he did not mean receiving *funds* from Guichart, but receiving intelligence that Guichart's order for Havannah sugars had been cancelled, and an order for Brazil sugars substituted for it. As Guichart's agent, it was his course of business to accept bills for goods purchased by Guichart: the information that the goods had come to hand was his accreditive; that information had been delayed in the present instance, because the Brazil sugars had been substituted for the Havannah, and the plaintiff only required the guaranty of the defendants till he had learned from Guichart that the substituted order had been executed. The defendants' letter of December 11th contained no admission that the acceptance was made on condition of the plaintiff's being in *funds* from Guichart, but merely an admission that if the plaintiff had apprized Guichart that their draft had not been honoured, they should esteem it an acceptance on account of Guichart: the plaintiff, however, had never stated to Guichart that the draft had not been honoured; his statement was, that he had honoured it provisionally till he received instructions as to the substitution of Brazil for Havannah sugars: when he received those instructions, the acceptance was absolute.

W. H. Watson, in reply, relied on the defendants' letters of the 1st and 11th of December, as showing conclusively that they considered the plaintiff to have accepted the bill under their guaranty till he should be in funds from Guichart. If it were otherwise, why should the defendants, on the 1st of December, have written to the plaintiff, "We have received from Guichart the assurance that he has arranged the needful with you for the protection of the draft. We have reserved to ourselves the right to any advantage which may accrue from the insurance."

TINDAL, C. J. This is an action for the value of 7449 marcs banco, alleged to have been received by the defendants to the use of the plaintiff. The question, which must be determined by the correspondence between the plaintiff and the defendants, is, whether the plaintiff accepted the bill drawn by the defendants for the above amount, for the

benefit of the defendants, or of Guichart: if it was accepted on account of the defendants, it is clear that the amount of the acceptance has been received by them to the use of the plaintiff; but if on the account of Guichart, then the plaintiff has no claim against the defendants.

It appears on the statement of the case, that Guichart had given the defendants an order for fifty cases of Havannah sugars, but revoked the order on the 1st of September: on the 8th of September, Guichart ordered of the defendants twenty cases of Brazil sugars, which the defendants forwarded to him at St. Petersburg on the 6th of October: on the same day they advised the plaintiff—Guichart's agent at Hamburg—of the shipment; transmitting to him a duplicate of the bill of lading, and drawing on him at the same time at three months after date for 7449 marcs banco, "at the debit of their friend at St. Petersburg, who gave them orders to that effect." On the 19th the plaintiff accepted the bill generally and returned it to the defendants. On the 23d he writes to the defendants,—“Your draft of the 6th I have accepted for the present under your guaranty, as I have not yet received the accreditive.”

We are called on to say what was the intention of the plaintiff in accepting this bill; whether he accepted it on the guaranty of the defendants till he should be in funds from Guichart, or only till he should have learned from Guichart the particular contract on which he should credit Guichart with the amount of the bill.

It appears that there was a doubt on the plaintiff's mind, whether he should place the bill to the credit of a contract on Havannah sugars, or a contract on Brazil sugars: if he had written to St. Petersburg for funds to cover the bill, it would appear that he never meant to bind himself: on the other hand, if he wrote to St. Petersburg merely to ascertain to which of the two contracts he should ascribe the amount of the bill, then he must be deemed to have taken the acceptance on himself, as soon as he received Guichart's instructions with respect to the Brazil sugars.

Now, on the 21st, before writing to the defendants that he had accepted the bill, for the present, under their guaranty, he writes to Guichart: “I accepted provisionally,”—not because he was not in funds, but—“because you accredited those friends with an order for Havannah sugars, not Brazil, and I require your instructions.”

On the 30th Guichart writes to him,—“Your favour of the 21st conveys to me insurance accounts for twenty cases of Brazil sugar, (for which you are credited,) and advice of Rougemonts' draft on you for those sugars, which I request you to pay on my account, and to release those friends from their guaranty: the credit opened with you for Havannah sugars, I request you to consider as cancelled.”

That was in effect saying that the credit opened for the Havannah sugars was to be transferred to the Brazil. At this time there was no suspicion of Guichart's circumstances.

Looking at these letters, the only effect that can be given to the word *accreditiv*e is, the order to execute the contract for Brazil sugars, instead of that for Havannah sugars.

It is true the letters of the 1st and 11th of December, throw some doubt on the point, but not enough to prevent us from seeing what was the real intention of the parties.

On the 1st, after Guichart's failure, the defendants write,—“We have

received from Guichart the assurance that he has arranged the needful with you for the protection of the draft; we reserve to ourselves any advantage which may accrue from the insurance."

Great stress is laid by the plaintiff on the words *arranged the needful*, as an admission that the defendants expected Guichart to supply the funds for the bill on their behalf: but I do not think that such is necessarily their meaning; they may mean no more than the arrangement with respect to the sugars, necessary to be understood before the plaintiff could ascribe the acceptance to any particular contract.

Then comes the defendants' letter of the 11th of December: "If you have written to Guichart that you had not honoured this draft, we can not consider your acceptance as valid in any other way than for the account of the latter;" and it is said that this is an admission, that the acceptance is not binding on the plaintiff: but I cannot see that this is so clear and unequivocal an admission as to counteract the effect of the preceding letters, and consequently our judgment must be for the defendants.

BOSANQUET, J., after examining the correspondence in detail, said,—The question simply is, whether, when the plaintiff accepted the bill, and wrote to Guichart on the subject, the point which he desired to ascertain was not whether the sugars he wrote about were the sugars to the account of which he was to ascribe the amount of the bill in his account with Guichart; if so, when he received the answer from Guichart that such was the case, his acceptance of the defendants' bill could be no longer covered by the defendants' guaranty.

COLTMAN, J. and ERSKINE, J., after drawing the same conclusion from the correspondence set out, concurred in giving

Judgment for the defendants.

SANSOM against RHODES.—p. 261.

By the conditions of a sale which took place September 18th, the purchaser was immediately to pay a deposit in part of the purchase money, and to sign an agreement for payment of the remainder by the 28th of November; the vendor was to deliver an abstract within fourteen days from the sale; and to deduce a good title; objections to the title were to be taken within twenty-one days after the delivery of the abstract; and the purchaser was to prepare the deeds of conveyance by the 10th of November.

Held, that no precise time was fixed within which the vendor was to deduce a good title, and that, therefore, a declaration against him for failing to do so ought to aver that he had been allowed a reasonable time.

THE declaration stated that the defendant, heretofore, to wit, on the 18th of September, 1838, caused to be put up to sale by public auction, in lots, certain ground rents, payable on premises situated in the county of Middlesex, and more particularly described in a particular of sale then published by the defendant, under and subject to certain conditions of sale, that is to say, (among other conditions,) "that each purchaser should pay down immediately a deposit of 10% per cent. in part of the purchase money, and sign an agreement for payment of the remainder on or before the 28th of November, 1838: all outgoings to be cleared to the 29th of September, 1838, from which time each purchaser should pay or allow interest at the rate of 4 per cent. per annum on the amount of his purchase money, less the sum deposited until the

purchase should be completed, without prejudice to the right reserved to the vendor by the last of the conditions : that a proper abstract should be delivered within 14 days from the day of the sale, and a good title deduced at the vendor's expense, having regard to the said conditions; but that the deeds of conveyance and assignment, including any assignment of terms attendant on the freeholds, should be prepared by and at the expense of the respective purchasers, and left at the office of the vendor's solicitors for execution on or before the 10th of November, 1838: that,—the deeds of the property relating to other property of the vendor of greater value,—the vendor should retain possession of the same, and enter into the usual covenants with the purchasers, at their expense, to produce and furnish copies, &c. : that any objections to the title should be communicated to the vendor's solicitor within 21 days after the delivery of the abstracts; and every objection not taken and so communicated within such period, should be deemed waived or not to be made, and, in that respect, time should be deemed of the essence of the contract: and by the last of the said conditions it was declared that, should the purchaser fail to comply with those conditions, or to pay the remainder of the purchase money at the time specified, the deposit money should be forfeited, and the vendor should be at full liberty to resell the property either by public auction or by private contract; and the deficiency, if any, by such second sale, together with all charges attending the same, should be made good by the defaulter at that sale, as and for liquidated damages, without the necessity of previously tendering a conveyance to the purchaser." That on such exposure to sale as aforesaid, to wit, on the said 18th of September, the plaintiff was the highest bidder for, and was declared the purchaser of a certain lot of the property so put up for sale by public auction, to wit, the lot thereof numbered 8 in the particular of sale, under and subject to the said conditions of sale, at and for a certain sum of money, to wit, 545*l.*, then at the said exposure to sale bid by the plaintiff for the same: and the plaintiff then paid to the defendant the sum of 54*l.* 10*s.*, a deposit of 10*l.* per cent. in part of the purchase money; and then signed an agreement for payment of the residue of the purchase money, on or before the 28th of November, 1838. Mutual promises to observe the conditions of sale. Breach, that, although the plaintiff, on the day and year first aforesaid, and from thence until, and upon, and after the said 28th of November, 1838, was ready and willing to perform and fulfil all things in the said conditions contained on his part and behalf as such purchaser to be performed and fulfilled, and to pay the remainder of the purchase money, and to complete the purchase; whereof the defendant then had notice; and was then requested by the plaintiff to deduce and make to him a good title to the said ground rents, having regard to the said conditions,—yet the defendant, not regarding the conditions of sale, nor his said promise, did not nor would, although often requested by the plaintiff so to do, deduce or make, or procure to be deduced or made to the plaintiff a good title to the said ground rents or any of them, regard being had to the said conditions or otherwise howsoever; but had hitherto wholly neglected and refused so to do, contrary to the said conditions of sale and the promise and undertaking of the defendant so by him made: by reason whereof the plaintiff had been deprived of all the advantages which would have accrued to him from the completion of the purchase; and had been put to great

expenses, to wit, 100*l.*, in endeavouring to procure such title, and about the investigating the title of the defendant to the said ground rents, and to get the said purchase completed; and had also lost all profits which he might and would otherwise have acquired from using the said sum of money so by him paid as deposit, and other moneys provided by the plaintiff for the completion of the purchase according to the said conditions of sale, and had been otherwise greatly injured and damaged.

Demurrer,—for that it did not appear by the said conditions or otherwise in the declaration, that the defendant, as such vendor, promised the plaintiff to deduce a good title within any specified or limited time; and that in the absence of such promise, the defendant was entitled to a reasonable time to be allowed to him for that purpose: that the declaration did not allege that a reasonable time, or any time whatever, was allowed to the defendant to deduce a good title, or that a reasonable time or any time had elapsed after the said day of sale, and before the commencement of this action. Joinder.

Bagley, in support of the demurrer. According to the conditions set forth on the declaration, no particular day was fixed by which the vendor was to deduce a good title: at the time of the sale, the purchaser was to pay a portion of the purchase money, and to sign an agreement to pay the remainder on the 28th of November: the vendor was to deliver an abstract within fourteen days of the sale, and he was to deduce a good title, having regard to the conditions; but those conditions specify no time within which the good title was to be deduced: objections were to be made within twenty-one days after the delivery of the abstract; and the deeds of conveyance were to be ready on or before November 10th: the purchaser, it is true, was to pay the money on the 28th, but he might do that conditionally, and the vendor might refund it if he failed ultimately to deduce a good title. It might be impossible for him to deduce such title by the 28th of November; and, at all events, there was no stipulation that he should do so, or by any specified day; he had, therefore, a reasonable time for that purpose, and the declaration ought to have averred that a reasonable time had been allowed. In *Lang v. Gale*, 1 M. & Selw. 111, where, by the conditions of sale, a draft of the conveyance was to be delivered within three months of the date of the conditions, **BAYLEY, J.**, said, "It was a condition precedent that the draft should be delivered by a particular day; but I do not consider the precise time of the delivery as an essential ingredient in that condition, which was meant only to secure a delivery within a reasonable time." That dictum has been disapproved of in *Sugden's Vendors and Purchasers*, because the draft was expressly to be delivered within three months: but in *Boehm v. Wood*, 1 Jac. & Walk. 419, and *Seton v. Slade*, 7 Ves. jun. 265, it was expressly laid down, that where no day is fixed for deducing the title, the vendor is allowed a reasonable time; in the same manner as the holders of bills of exchange, for presentment and notice of dishonour; *Hilton v. Shepherd*, 6 East, 14, note; *Fry v. Hill*, 7 Taunt. 397, (2 E. C. L. R. 152,) and the precedents accordingly aver the lapse of a reasonable time before action brought: *Orme v. Broughton*, 10 Bing. 533, (25 E. C. L. R. 231;) *Hodges v. Lord Litchfield*, 1 New Cases, 492, (27 E. C. L. R. 469.) In *Berry v. Young*, 2 Esp. 640, note, the contract specified a particular day; and in *Cornish v. Rowley*, Selw. N. P. Auction, 177,

which may be cited for the plaintiff, it does not appear what the conditions were as to the time for deducing a good title.

Whately, contra,—after declining an offer to amend,—contended, that here, a particular day was specified in the conditions, for making a good title, namely, the 10th of November; or, at all events, the 28th; for, on the 10th, the purchaser was to deliver the draft of a conveyance which he could not draw up, and on the 28th he was to pay the remainder of the purchase-money, which he could not be called on to do, unless a good title had been clearly made out. A vendor is bound to make out a good title by the day on which the purchase is to be completed, or the purchaser may recover the deposit money: *Sugd. V. and P. 371*; for time is of the essence of the contract: *Berry v. Young*, *Sugd. V. and P. 360. 365*. In *Cornish v. Rowley*, Lord KENYON said, “As to the sentiments which I have long entertained relative to the purchase of real estates, I find no reason for receding from them. They have been confirmed by conversing with those whose authority is much greater than mine. The vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, I am aware, is often given for the purpose of procuring probates of wills, letters of administration, and acts of parliament; but this indulgence is voluntary on the part of the intended purchaser; it is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it.” *Erskine*, for the defendant: “Do I understand your lordship to say, that though the defendant can now make out a good title, yet, as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?” KENYON, C. J. “He certainly may, and avoid the contract. When the abstract is delivered by the seller, he must be able to verify it by the title deeds in his possession. As a good title was not made out at the day fixed, I shall direct the jury to find a verdict for the deposit, with interest up to that day.” *Seaward v. Willock*, 5 East, 198; *Wilde v. Fort*, 4 Taunt. 334; and *Bartlett v. Tuchin*, 1 Marsh. 583, establish the same principle.

TINDAL, C. J. This is an action by the purchaser against the vendor of certain ground rents, to recover the deposit paid at the time of the sale, and damages for the breach of the contract. The breach assigned in the declaration is, that the defendant, not regarding the conditions of sale, nor his said promise, did not, nor would, although often requested by the plaintiff so to do, deduce or make, or procure to be deduced or made to the plaintiff, a good title to the said ground rents, or any of them, regard being had to the said conditions, or otherwise howsoever; but wholly neglected and refused so to do, contrary to the said conditions of sale, and the promise and undertaking of the defendant so by him made.

To this declaration the defendant has demurred specially, assigning for cause, that it does not appear by the conditions of sale or otherwise in the declaration, that the defendant promised to deduce a good title within any specified time; and that the declaration ought to have alleged that a reasonable time had been allowed: and the question is, whether those defects exist in the declaration or not. It sets out with stating the sale by auction of certain ground rents on the 18th of September, under conditions of sale, one of which was,—that an abstract

should be delivered within fourteen days,—which would expire on the 2d of October;—that all objections to the title should be communicated to the vendor within twenty-one days after the delivery of the abstract;—that would carry the time to the 23d of October;—that a conveyance should be prepared at the expense of the purchaser, and left with the vendor's solicitor on or before the 10th of November, and that the purchaser should sign an agreement to pay the purchase-money on or before the 28th. Then, does this necessarily imply an agreement to make out a good title on or before the 28th of November? No doubt, if there had been an express agreement for making out a good title by that day, the vendor would have been bound by it, and time would have been of the essence of the contract; but this is merely an agreement for payment of the purchase-money by the 28th of November, and it is quite consistent with that, that matters might remain in *feri* as to the title, for the purpose of satisfying doubts, the investigations consequent upon which might occupy a longer time. It seems to me, therefore, that it is not shown upon this declaration that there was any precise day fixed by which it was incumbent on the vendor to deduce a good title: if no precise time was fixed, the law implies that the party shall have reasonable time; but there is no allegation in the declaration, that a reasonable time has been allowed; the causes, therefore, for special demurrer pointed out by the defendant, have been established, and the plaintiff having declined to amend, our judgment must be for the defendant.

BOSANQUET, J. I am of the same opinion. The declaration neither states a particular day by which a good title was to be made out, nor does it allege that the defendant was allowed a reasonable time. It is contended, however, that it appears from the conditions of sale set out, that the title was to be made out by the 28th of November. Now the conditions are, that the vendor shall deliver an abstract within fourteen days, and make out a good title; but for making that out, no time is specified; the purchaser is to make all objections within twenty-one days after the delivery of the abstract, and to sign an agreement to pay the purchase-money on the 28th of November: that it is a condition which binds the purchaser, not the vendor; and the question is whether the purchaser's signing such an agreement implies an agreement by the vendor, that he will at all events complete the title by that day: I think it does not; and that therefore our judgment must be for the defendant.

ERSKINE, J. If it had appeared on the declaration that the 28th of November was the day for completing a good title, I should have been of opinion that the breach assigned was sufficient; and at first I thought the averments did amount to that: but upon further consideration of the precise terms of the declaration, it does not seem to me necessarily to follow that, because the purchaser was to sign an agreement to pay the purchase-money by the 28th of November, therefore the title was also to be completed by that day.

MAULE, J. I am also of opinion that the declaration is ill, as it neither alleges any precise time within which the defendant was to deduce a good title, nor avers that a reasonable time for doing so had elapsed before action. Supposing even that by a good title was meant a good title upon the face of the abstract, then, by the conditions of sale, fourteen days were to be allowed for delivering the abstract; and it is not averred in the declaration, that fourteen days had elapsed between the sale and the commencement of this suit. Consequently there must be

Judgment for the defendant.

LONDON and BRIGHTON Railway Company against FAIRCLOUGH.—p. 270.

By a railroad act it was enacted that in an action for calls it should be sufficient for the company to prove that the defendant was a proprietor of shares at the time of the calls for which the action is brought:—the Court refused to allow the defendant in such an action to plead, in addition to *never indebted*, and *not a proprietor*, that defendant had forfeited his shares before the calls in question were made; or, that he had forfeited his shares and ceased to be proprietor after the calls, and before action.

IN debt for calls due from the defendant as a proprietor of shares in the London and Brighton Railway Company, the defendant, when under terms of pleading issuably, had obtained a judge's order for pleading, 1. Never indebted; 2. Defendant not a proprietor; 3. That by nonpayment of previous calls he had forfeited his shares before the making the calls in question; 4. That he had forfeited his shares, and ceased to be a proprietor after the making of the calls in question, and before the commencement of this action.

Talfourd, Serjt., obtained a rule nisi to set aside this order as to the last two pleas, on the ground that by the Railway Act, 1 Vict. c. cxix. s. 148, it is sufficient for the company to prove at the trial that the defendant was a proprietor of shares at the time of the calls for which the action is brought. The third plea, therefore, was unnecessary in addition to the second, and the fourth was inconsistent with the act. See *ante*, p. 135.

Stephen, Serjt., for the defendant, contended that it would be hard to deprive him of the power of showing that he had ceased to be a proprietor before the action commenced, as the company might reimburse themselves by disposing of the forfeited shares.

Sed per Curiam. The third plea is unnecessary; and the fourth contrary to the spirit and meaning of the act of parliament. The rule must be made

Absolute.

WRAY against BROWN.—p. 271.

The Court refused to order a plaintiff to give security for costs on the ground that he had been three times an insolvent and once a bankrupt, and was only suing as trustee for a third person.

THIS action was brought on a promissory note for 52*l.* 10*s.*, made by the defendant, payable to the plaintiff,—not plaintiff *or order*,—and due December 21, 1839.

Talfourd, Serjt., on behalf of the defendant, moved for security for costs, on an affidavit that the plaintiff had been discharged by the Insolvent Debtor's Court, in August, 1827, July, 1831, and November, 1839, and had also been a bankrupt;

That he brought this action as trustee for one Fether, in whose hands he had placed the note as a collateral security for a debt of the same amount, due from himself to Fether; and

That the defendant had a good defence upon the merits.

The debt due from the plaintiff to Fether, appeared in the plaintiff's schedule, and the circumstances under which Fether held the note.

Tulfourd cited *Heaford v. Knight*, 2 B. & C. 579, (9 E. C. L. R. 186,) where the plaintiff having been discharged under the Insolvent Debtors' Act after issue joined, and before notice of trial, the Court stayed the proceedings until the assignee or some creditor of the plaintiff should give security for costs; and *Doyle v. Anderson*, 2 Dowl. 596. Here, the action was commenced after the discharge; but, as the insolvent had no interest in the suit, and merely acted as a trustee, he ought to give security.

A rule nisi having been granted,

Spankie, Serjt., showed cause on an affidavit that the assignees had refused to sue: on which ground, the action having been commenced after the discharge, he contended the Court would not require the plaintiff to give security for costs; for in *Townsend v. Snow*, 1 Marsh. 477, it was laid down that the Court would not set aside the proceedings, nor require an insolvent to give security for costs in an action where the assignees had refused to sue. Then, in *Morgan v. Evans*, 7 B. Moore, 344, (17 E. C. L. R. 76,) the Court refused to require the plaintiff to give security for costs, although it was sworn that he was insolvent, and that the action was brought in his name for the benefit of one who was alone beneficially interested in the result.

Tulfourd, in support of the rule, relied on *Heaford v. Knight*, and urged, if neither ground, taken singly, were deemed sufficient for calling on the plaintiff to give security for costs, yet, when the two were united, the Court would lend its aid to protect the defendant from probable loss.

TINDAL, C. J. As each of the grounds, taken separately, does not present a sufficient reason for calling on the plaintiff to give security for costs, so I am of opinion that they do not help each other. That the plaintiff has made over the debt, and sues as a trustee, is clearly no sufficient ground. That is established by *Morgan v. Evans*; and that insolvency of itself is not sufficient, appears from *Townsend v. Snow*. The principle laid down by Lord KENYON, in *Webb v. Ward*, 7 T. R. 296, is that security for costs is not required at the hands of a bankrupt in all cases, but only when he sues for the benefit of his assignees.

BOSANQUET, J., concurred.

ERSKINE, J. It is so clear that the plaintiff's suing as trustees for another, is no ground for calling on him to give security for costs, that the party applying for the rule has been obliged to add another ground, namely, that the plaintiff is insolvent; but that has been held insufficient in *Morgan v. Evans*; and I think it makes no difference that both the circumstances are united here.

MAULE, J. I think this case is governed by *Morgan v. Evans*, and that the rule must be

Discharged.

GORDON against SMITH.—p. 273.

Issue joined on matters of fact, with a demurrer to one plea in Michaelmas term, 1836: in January, 1840, that plea and demurrer were struck out. Plaintiff never having demanded a joinder in demurrer. The Court refused to enter judgment as in case of a nonsuit.

ATCHERLEY, Serjt., showed cause against a rule for judgment in case of a nonsuit.

Issue on matters of fact was joined in Michaelmas term, 1836. But there was a demurrer to one of the pleas, on which the plaintiff had never demanded a joinder in demurrer. For which reason,

On the 6th of January, 1840, the plea and demurrer thereto, were, by order of a judge, at the instance of the defendant, directed to be struck out on payment of costs: those costs having been paid on the 23d, the present rule was obtained, on the ground that the plaintiff ought to have gone to trial at some former assizes: *Atcherley* contended that while the demurrer was pending, the plaintiff was not bound to go to trial.

Bompas, Serjt., in support of the rule, maintained that the plaintiff was in default for not demanding a joinder in demurrer; and that when the demurrer was struck out the defendant was in the same position as if it had never existed.

TINDAL, C. J. If there was default in not demanding a joinder in demurrer, it cannot be visited in this way; the defendant might have gone to trial by proviso.

Rule discharged.

GOLDSTONE and Another, Executors of ANN TOVEY, against THOMAS TOVEY.—p. 274.

Plaintiff's attorney in possession of a probate essential to defendant's case, having given an oral, but having refused to give a written undertaking to produce it at the trial, defendant's attorney warned him that an exemplification of the will must be procured at a heavy expense: the probate was produced at the trial on the part of plaintiffs:

Held, that defendant, who obtained the verdict, was entitled only to the expense of an ordinary copy of the will, and of a summons to call on plaintiffs to admit it.

THE plaintiffs sued the defendant for money paid by them to his use on certain promissory notes signed by the testatrix, and due after her decease, which notes the defendant had negotiated in discharge of his own debts. The defendant pleaded *non assumpsit*.

The testatrix was stepmother of the defendant, who contended at the trial, that the notes were a gift to him from her, while the plaintiffs insisted that the notes were a loan. (a)

The jury found a verdict for the defendant.

The master in taxing costs, having allowed the defendant 12*l.* for an exemplification of the will of Ann Tovey, in which she had bequeathed the defendant a legacy of 200*l.*,

Bompas, Serjt., obtained a rule *nisi* for a review of the taxation, on an affidavit of the plaintiff's attorney, that having proposed to produce the will at the trial for the purpose of showing that the plaintiffs had acted honourably, he called upon the defendant to admit the probate upon a summons before a judge at chambers; that it was there admitted; and given in evidence by the plaintiff on the trial of the cause; and that he, the plaintiff's attorney, had not received any notice from the defendant to admit the original will or a copy, which might have been obtained for 1*l.*:—under the rule of Hilary 4 W. 4, therefore, which provides that no costs of proving any document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall

have refused to make the admission, the costs in question ought not to have been allowed.

Bingham showed cause, on an affidavit, that the defendant's attorney, under the advice of his special pleader, had called on the plaintiff's attorney to give a written undertaking to produce the probate at the trial; that the plaintiff's attorney refused to give any such undertaking, saying that he meant to give the will in evidence himself; whereupon the defendant's attorney warned him, that unless the written undertaking were given, he must under the advice of his special pleader incur the expense of 10*l.* or 12*l.* to procure an exemplification.

It was contended that, under these circumstances, the rule of Hilary 4 W. 4, had nothing to do with the case. The expense in question had not been incurred in proving the will, nor had the defendant adduced it in evidence at the trial, for it had been produced by the plaintiffs; but it was a preliminary expense, incurred, not in proof, but with a view to proof; and rendered necessary by the unprofessional obstinacy of the plaintiffs' attorney in refusing to give a written undertaking, which the defendant was entitled to require. The production of the will was essential to the defendant's case, which rested on proof of the kindness of the testatrix towards him to the day of her death; but it was only garnish to the plaintiffs' case, as the executorship was not denied by the plea; the defendant, therefore, could have no sufficient assurance that the plaintiffs would produce the will, without the written undertaking of their attorney, and as he received distinct warning of the consequences which would attend his refusal, the expense ought to be allowed, for nothing but an exemplification was strictly evidence of the will.

Bompas, Serjt., maintained that the expense of an exemplification was unnecessary, and had been incurred vindictively; for the plaintiffs might have been called on by summons to admit a copy which might have been obtained for 1*l.*; and

The Court, saying that this was the course which ought to have been pursued, directed a review of the taxation; the master to allow the defendant the costs of an ordinary copy, and of a summons to obtain an admission of it on the part of the plaintiffs.

Rule absolute.

TAYLOR against SHUTTLEWORTH.—p. 277.

Defendant having agreed to buy of plaintiff certain property, for which he was to pay an annuity and a large sum by instalments, a verdict for 10,000*l.* was taken in an action for default of payment, subject to a reference of the cause and all matters in difference; 3500*l.* to be paid by defendant to the arbitrator, to be by him paid to plaintiff if found due in the action, and the arbitrator to order what should be done by the parties. The arbitrator directed that defendant should pay, in addition to the 3500*l.*, a gross sum, including the value of the annuity, without distinguishing how much in respect of the matters in difference, and how much in respect of the cause, but ordered a verdict on all the issues to be entered for plaintiff: Held, a valid award as against defendant: also, that an act of bankruptcy committed by defendant before the award, on which a *fiat* was issued the day after publication of the award, was no ground for setting it aside.

THE defendant had agreed to buy of the plaintiff his share of a pin patent machinery, the business and the lease of a certain mill in which the manufacture was carried on, together with an estate in Gloucestershire. The defendant was to give for the whole an annuity of

300*l.* a year, payable quarterly, and 3500*l.* by instalments; viz. 1500*l.* on the 25th of February, 1839, 1000*l.* on the 25th of March, and 1000*l.* on the 1st of July. On the 1st of January, 1839, he was to give a warrant of attorney for securing the payments, but judgment was not to be entered up thereon until the 1st of July following, and then only in case of default in any of the payments. The annuity was to be secured on property of sufficient value, to the satisfaction of the plaintiff's solicitor.

The present action was brought for a breach of the agreement, and the plaintiff alleged in his declaration that the defendant had never executed the warrant of attorney; that he had not paid the 1500*l.* on the 25th of February, 1839, or the 1000*l.* on the 25th of March; that he had not paid 75*l.* for the first quarter of the annuity, nor had he in any manner secured the annuity. Issue was joined on these allegations.

At the Gloucester Assizes, August 7, 1839, a verdict was taken for the plaintiff in the sum of 10,000*l.*, the damages laid in the declaration, subject to a reference under an order of *Nisi Prius*, which authorized the arbitrator to settle the cause and all matters in difference between the parties, and required the defendant to pay to the arbitrator, on or before the 10th of October then next, 3500*l.* on account, to be paid out by the arbitrator to such of the parties as he might think fit: if the money was not paid to the arbitrator by October 10, judgment was to be entered up for 10,000*l.*, and execution issued for 2637*l.* and costs, with interest from the 7th of August, together with the costs of the reference and of any award which might then be made. The arbitrator was to order and determine what he should think fit to be done by the parties respecting the matters in dispute: the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator.

The arbitrator awarded that the plaintiff was entitled to have a verdict entered for him on the several issues joined in the cause, and had sustained damages by reason of the premises in the pleadings in the cause mentioned, and of the several other matters in difference between the parties, to the amount of 6067*l.*; he ordered the 3500*l.* deposited with him to be paid to the plaintiff on account of the damages so found due to him, and directed the defendant to pay 2567*l.*, the balance of such damages, on the 21st of January, 1840; also the costs of the reference and award. Upon such payment of the damages, costs, and charges being made, the plaintiff was to assign and convey to the defendant his interest in the pin patent machinery, the business annexed, the lease of the mill, and the estate in Gloucestershire, and at the expense of the defendant to execute a release of the annuity of 300*l.*, agreed to be secured to the plaintiff.

The award was published on the 18th of December, 1839, and delivered to the defendant on the 19th.

It appeared by affidavit that the counsel for the defendant objected before the arbitrator to his awarding the value of the annuity, and contended that the plaintiff was only entitled to such damages in respect of the annuity as he had sustained for want of security, and by non-payment of the arrears.

It was also deposed that, on the 14th of December, the defendant committed an act of bankruptcy; that a docquet was struck, of which the arbitrator had notice on the same day; and that on the 19th a *fiat*

was issued against the defendant, under which he was declared a bankrupt.

Talfourd, Serjt., obtained a rule *nisi* to set aside the award on the ground, first, that the arbitrator had awarded a gross sum to the plaintiff, without distinguishing how much was to be paid in respect of the action, and how much in respect of the matters in difference; or for how much the verdict was to be entered; so that the award was not final: and he relied on *Martin v. Burge*, 4 Adol. & Ell. 973, (31 E. C. L. R. 242,) where, on the trial of a cause, a verdict was taken for 3000*l.* subject to a reference; the arbitrator to direct a verdict for the plaintiff or the defendant, as he should think proper; and also to determine all matters in difference, except as to costs, the settlement of which was provided for by the order of reference: the arbitrator directed a verdict to be entered for the plaintiff, without saying for how much, and that the defendant should, at a time and place named, pay the plaintiff or his attorney 260*l.*: it was held an uncertain award; and LITLEDALE, J., said, "The arbitrator should have stated for what sum the verdict was to be entered:—"

Secondly, that the arbitrator had exceeded his authority in awarding a gross sum as the value of the annuity; and,

Thirdly, that the defendant had become bankrupt before the award was made.

R. V. Richards (*Lee* and *W. Alexander* were with him) showed cause.

First, the effect of the order of *nisi prius* was, that the verdict should stand as a security for the whole sum to be awarded as well in respect of the matters in difference, as in respect of the action; it was unnecessary, therefore, for the arbitrator to specify how much he awarded on each head separately. In *Prentice v. Reed*, 1 Taunt. 158, where a cause and matters in difference were referred and a verdict was entered for 500*l.* subject to the award, MANSFIELD, C. J., said, "It was meant that the verdict should stand as a security for the plaintiff receiving the sum to which he was in justice entitled:—" and for that sum he might issue execution, taking more at his peril. So in *Smith v. Festiniog Railway Company*, 4 New Cases, 23, (33 E. C. L. R. 270,) where two issues were raised in answer to one breach of covenant, and an arbitrator to whom the cause and all matters in difference were referred, ordered a verdict to be entered for the plaintiff on the first issue with 1*s.* damages, and on the second, with 13*s.* 4*d.*; the Court held that it was not necessary to award a single sum upon the entire breach, and said, "There is no imputation that the arbitrator has not decided consistently with the merits; and to set aside the award on this ground, would be straining to get rid of the justice of the case." In *Martin v. Burge* the arbitrator had express authority to enter a verdict for the plaintiff or defendant as he should think proper; here, the arbitrator's authority is to settle the cause, not to enter the verdict: the verdict entered at the trial, therefore, must stand as security for payment of the sum at which the arbitrator may settle the cause; and *Martin v. Burge* has no bearing on the question.

Then, under the power to determine what should be done by the parties respecting the matters in dispute, the arbitrator had authority to order the payment of a gross sum in discharge of the annuity. In *Dunn v. Murray*, 9 B. & C. 780, (17 E. C. L. R. 498,) where the plain-

tiff, who had been dismissed from the defendant's service, sought to recover an annual stipend payable by five guineas a week, but brought his action before the end of a year, and an arbitrator awarded the amount which would have been payable up to the time of commencing the action, that award was held a bar to a second action for the further weekly payments to the end of the year.

As to the bankruptcy of the defendant, in *Andrews v. Palmer*, 4 B. & Ald. 250, (6 E. C. L. R. 417,) where a case was referred by order of *nisi prius*, and after the reference, but before the making of the award, the plaintiff became bankrupt, it was held that that was no revocation of the submission. *Haswell v. Thorogood*, 7 B. & C. 705, (14 E. C. L. R. 111,) was decided on the same principle. In *Marsh v. Wood*, 9 B. & C. 659, (17 E. C. L. R. 468,) where the plaintiff became bankrupt after the reference, the defendants revoked their submission before the award was made, and the provisional assignee had assigned to the assignees under the commission: but now, by 2 & 3 Vict. c. 29, every *bonâ fide* transaction of the bankrupt before *fiat* issued is valid, notwithstanding any prior act of bankruptcy of which the party dealing with the bankrupt has no notice. Here, however, the Court had no knowledge that the defendant had become bankrupt, except from the representations in the affidavits, and they would not decide the question of bankruptcy in a summary way on affidavit.

Tulfourd, Serjeant, and *Whateley*, in support of the rule, as to the first point, relied on *Mortin v. Burge*, which they contended was not distinguishable from the present case: the power to settle the cause was in effect the same thing as a power to enter a verdict for the successful party; and that the arbitrator ought to have done here, for the sum recoverable in the action, otherwise the plaintiff might issue execution for 10,000*l.*, the verdict taken at the trial; or, if that were not allowable, would have no remedy for the costs of the action. The issues in the action, and the amount payable in respect of the matters in difference, ought therefore to have been separately disposed of. Thus, in *Doe dem. Madkins v. Horner*, 8 Adol. & Ell. 235, (35 E. C. L. R. 382,) where an ejectment being brought on two demises, all matters in difference in the cause were referred by a judge's order, which directed that the costs of the suit, and of the reference and award, should abide the event of the award; that the party in whose favour the award should be, might sign judgment in the same manner as if the cause had been tried at *nisi prius*; and that if it was in the plaintiff's favour, he might issue a writ of possession thereon, and proceed in the usual way for costs on such judgment; the arbitrator awarded that the plaintiff was entitled to the possession "of a certain part of the lands sought to be recovered," which he set out by boundaries; the award stated nothing as to the residue; did not say on which demise the plaintiff was entitled; and gave no damages; it was held, first, that the award was bad for not stating on which demise the plaintiff was entitled; secondly, for not expressly deciding as to the residue. *Ross v. Boards*, 8 Adol. & Ell. 290, (35 E. C. L. R. 390,) was determined on the same principle; so that according to those cases this award was not final.

And the arbitrator had no authority to award a gross sum in discharge of the annuity: suppose a party took a house at a fixed rent. with an undertaking to give security for payment; if the rent were in

arrear, and the dispute on the subject referred, could the arbitrator award that, instead of paying the rent, the lessee should purchase the house; or, if he had agreed to purchase and pay by instalments, that he should pay the entire amount at once? In *Dunn v. Murray*, the plaintiff sought to recover a weekly salary to the end of a year for which he had been engaged, but brought his action upon dismissal before the year had expired; the arbitrator, in awarding payment up to the commencement of the suit, decided in effect that the plaintiff had no claim for the residue of the year; and the Court held his award a bar to any further action; but that decision would not warrant an arbitrator in ordering the redemption of an annuity by an immediate payment of the value.

As to the bankruptcy, in *Marsh v. Wood*, the Court expressly held, that by the bankruptcy, the subject-matter of the reference being taken out of the bankrupt, the submission was no longer mutual, and, therefore, not binding on the assignees: and in *Ex parte Kemshead*, 1 Rose, 149, proof upon an award made after the act of bankruptcy was extinguished, and an account directed before the commissioners.

TINDAL, C. J. It appears to me that the several objections which have been made against the validity of this award are satisfactorily answered.

The first of them is, that the arbitrator has awarded a gross sum, on account of the action and all matters in difference, without determining what sum is due in respect of each.

Now I agree, if this case had resembled in its circumstances that of *Mortin v. Burge*, upon which this motion was originally made, there would have been some ground, probably sufficient ground, for setting aside the award. But it seems to me, from the peculiar circumstances under which this arbitration was entered into, and the terms of the order of reference showing in effect that no possible injury can accrue to the defendant from that which he calls the want of finality in the award, that the award is sufficiently final.

It appears that the action was referred upon the terms that a verdict should be entered for the plaintiff, damages 10,000*l.*, subject to the award of an arbitrator, who was to settle the cause and all matters in difference between the parties. The order of reference does not stop there, but it stipulates that the sum of 3500*l.* shall be paid into the hands of the arbitrator before a given day, and in case that sum is not paid to the arbitrator by the day mentioned in the rule of reference, then judgment is to be signed for the damages in the declaration, and execution is to issue for 2657*l.* and costs and interest.

The arbitrator, in his award, states that the sum of 3500*l.* was paid into his hands by the stipulated day, and the consequence, therefore, is, that the only mode in which the plaintiff could have availed himself of this verdict, which is entered *pro formâ* for 10,000*l.*, is abrogated and taken away, because the event has never happened which entitled him to it.

Then the arbitrator goes on to say that there is due (and that is one ground on which complaint is made against the award) upon the subject-matter of the action, and also of the several matters in difference between the parties, the sum of 6067*l.*: he then appropriates the sum of 3500*l.* which he has received, in part payment of that amount,

and directs that the remainder, 2567*l.*, shall be paid by the 21st of January.

It appears to me, therefore, on the face of the award, as far as I have now gone, it is utterly impossible that the plaintiff could have ever availed himself of the verdict which has been entered up for 10,000*l.*, on the very ground which appears on the face of the award itself. And as the arbitrator goes on to say that, on the payment of the 2567*l.* and costs to the plaintiff, a release shall be executed by him, I want to know whether he has not, within the meaning of the award, settled the cause and all matters in difference between the parties. As the arbitrator has followed the directions that were given to him, the award is final, and the defendant is perfectly free from the possibility of any future claim against him, either upon the ground of the action or of the matters in difference, when that release is given which the arbitrator has directed.

The next objection is, that the arbitrator has awarded a gross sum to be paid as the value or price of the annuity, and that he had no authority to do so: and I agree that where a party has brought an action merely for the arrears of an annuity which is due, and that action is referred, that will not give the arbitrator the right or power to fix the value of the annuity, and to throw so large a burden on the defendant; but that is not the case here. This was an agreement not only that the defendant should pay the annuity, but that he should give ample security upon property to the satisfaction of persons named in the original agreement. The declaration alleges, as one breach, the non-payment of the arrears of the annuity; and as another, that the defendant had not found security for the annuity. When that was brought before the arbitrator as one of the grounds of difference between the parties, and the order of reference stipulates expressly that the parties shall do whatever the arbitrator directs on the subject-matter, it seems to me within the power so given to him, if he found (as we must suppose he did find) that there was no ample or sufficient security in the possession or power of the defendant, that he should say at once, I will fix what the value of the annuity is, and it shall be paid as matter of damage to the plaintiff.

Then, as to the third ground, that just before the award was made, the defendant became bankrupt, and the bankruptcy of the defendant gave him a power to revoke, and, in point of law, was a revocation of the authority of the arbitrator:—In the first place, it is by no means clear on the affidavits brought before us that he did become a bankrupt; no affidavit is made of the fact of the bankruptcy, but a reference only to a certain proceedings which are not brought before us. I think it is far too grave a question to be decided on motion. The defendant or the assignees are asking us upon so loose an affidavit to set aside the whole security of the plaintiff, whereas the plaintiff ought to be at liberty, if he thinks proper, to discuss the question of bankruptcy before a jury, and raise the point as a matter of law, in a more grave and solemn way than he can upon affidavit.

BOSANQUET, J. I entirely concur in what has been stated by my lord chief justice, and feel it necessary to say but a few words on each of the points put forward.

The first objection has been founded upon the case of *Martin v. Burge*; but the present case appears to me to be wholly distinguish-

able from that. There, a verdict was taken for the sum of 3000*l.*; there was a reference of the cause and of all matters in difference; and it was left to the arbitrator to say what should be done between the parties. The arbitrator in that case made no award with respect to the verdict of 3000*l.* The verdict, therefore, stood unaffected by that award; and it is that part of the case which is applied to the objection which has now been made. But when the arbitrator awarded that a given sum of 260*l.* 12*s.* 6*d.*, should be paid to the plaintiff, it did not appear in respect of what claim that sum was awarded; whether on account of that which was the subject of the verdict, so as to form matter of implication that the verdict was to be reduced that amount, or whether it was upon the account of all matters in difference; and, therefore the Court, on that ground, set aside that award.

Now, that doubt has been entirely cleared up with regard to the present case, because it is awarded by the arbitrator, that on all the issues joined the plaintiff is entitled to a verdict; and it is expressly awarded that a large sum of money on account of the matters in the pleadings, and also on account of the matters in difference, shall be paid by the one party to the other. It appears, therefore, clearly, that the whole of the sum is on account not only of that which is the subject of the action, but that which is the subject of the matters in difference, and which reduces the objection to this point, and this point only,—whether it was necessary that in making the award the arbitrator should separate and distinguish, how much on one account, and how much on the other.

It is true, that he has not said any thing with regard to this verdict for 10,000*l.* standing or being reduced. But it is quite clear that after the award is made the plaintiff cannot avail himself of that verdict. The plaintiff may thereby be delayed in getting his costs; but it is not the plaintiff who complains of the award; and the whole of this sum awarded, although that part which relates to the matters in difference may not be recoverable under the verdict and judgment, may be recovered by the ordinary proceedings under an award.

With respect to the second question I cannot entertain any doubt, when we see that by the terms of the submission the cause is to be settled and all matters in difference; and the arbitrator is to have the power to direct what shall be done between the parties.

The arbitrator, who has taken this matter into his consideration, and had power to determine what should be done between the parties, has properly directed that a sum of money shall be paid on account of the annuity; that the annuity shall be put an end to; and a release given to the grantor.

The third question is, whether this submission to arbitration is revoked by the bankruptcy which is alleged to have taken place. In the first place, it does not satisfactorily appear to us in such a manner as we can take upon ourselves to act upon it, whether there has been an act of bankruptcy or not: we are not to deprive those who choose to contest it of the power to try this question. In the next place we have no authority laid before us to show that the party is entitled to revoke a submission to arbitration in consequence of his having so committed an act of bankruptcy. What is said by Lord TENTERDEN, in *Marsh v. Wood*, leaves that as a doubtful question altogether. This application is not made on the part of the assignees, because they are not

made parties to this rule, and even if they were, it is not a matter we ought to decide on motion.

ERSKINE, J. For the reasons which have been already given, I agree with the rest of the Court that *Mortin v. Burge* is materially different from the present case. On the trial of this cause, a verdict was taken by consent for 10,000*l.*, subject to a reference to an arbitrator, who should settle the cause, and also all matters in difference. The arbitrator, in making his award, gave a sum of 6067*l.*, without saying how much of that sum is to be taken as damages recoverable in the action, and how much is to be taken as awarded on the other matters in difference. And it is argued by the defendant that he is injured, because the arbitrator has not in any way modified the verdict for 10,000*l.* If it had appeared to the Court that the plaintiff could enter up judgment for the 10,000*l.*, and under that authority get a better security for the payment of the 6067*l.* than he could under the award, that might have been a grievance of which the defendant would have a right to complain; but it does not appear to me that such can be the consequence of the arbitrator not having made any reference to the verdict: the verdict is not to stand as a security for any specific sum which the arbitrator may award; but only for such a sum as the arbitrator may find to be the damage recoverable in the action. If the arbitrator has not found any particular sum to be recoverable in this action for damages, the verdict does not stand as a security for any part of the sum that he has awarded.

Although the plaintiff might complain that he had not the benefit of that verdict as a security for his damages, the defendant surely has no right to complain that he is not subject to have a judgment entered up for that amount, whereby a better remedy would be given to the plaintiff than he has under the present award. It is stated that there is a difficulty as to the costs of the action: that may be; and the plaintiff may also lose that advantage; but he is not the person complaining of any such loss; it cannot be a grievance to the assignees that the plaintiff has lost the costs in the cause, because no verdict has been entered up; and therefore upon that ground I think the defendant fails altogether.

The second objection is, that the arbitrator has awarded a gross amount as the value of the annuity. But the defendant having failed altogether in the agreement to secure the annuity, the arbitrator has done right in making the defendant pay in money what he was found to be incapable of securing according to his agreement.

The third objection is, that before the award was made, the defendant became bankrupt. I agree with the rest of the Court, that the fact of the bankruptcy is not satisfactorily made out upon these affidavits: but it appears to me if we were satisfied that that was made out, it would be no answer; because, according to the case of *Marsh v. Wood*, though the bankruptcy might be held a revocation where the party had the power to revoke, yet in a case where the party had not the power to revoke, the bankruptcy of either would not operate as a revocation. In this case neither party had authority to revoke the submission; and therefore the bankruptcy of one of them would not have that effect. If the assignees had been chosen, and the reference had been pending, it would have been right to have had the assignees called before the arbitrator, that they might take the bankrupt's place as a party to the

reference: but the whole reference had been gone through, except the ceremony of making the award. It seems to me, therefore, that the arbitrator had a right to proceed and make the award, without reference to any notice of a docket which it appears had been struck, and which might raise the suspicion that it was a bankruptcy got up for the purpose of defeating the award; for it appears that the act of bankruptcy was on the 14th, the docket was on the 14th, and the notice is on the 14th; all just immediately preceding the time when the award was to be made: however, it does not appear to me that the act of bankruptcy is made out; or, if it were made out, that it would operate as a revocation of the authority of the arbitrator.

MAULE, J. I also think the rule ought to be discharged. The first objection in substance is, that the arbitrator having awarded a sum of money to be paid by the defendant, has not stated what sum the verdict should be entered for; whether for some portion of the sum awarded, or for the whole. That is the omission of which the defendant complains; the plaintiff does not complain of it, although he may suffer an inconvenience by it. The arbitrator might, I think, have ordered the verdict to be entered for the sum of 2500*l.* or any other sum which did not exceed the difference between the 3500*l.* and the 10,000*l.*; in short, he might have awarded any sum not exceeding 10,000*l.* including the 3500*l.* paid into court. But the arbitrator having awarded that 6067*l.* are due in respect of the damages in the action as well as the other matters in difference, without distinction, the effect of that is, that the plaintiff cannot enter any verdict at all, or take any benefit of the judgment in order to enforce that verdict: but that is no detriment to the defendant. The plaintiff might have said that the arbitrator was bound, in respect of the demand in the action for damages, to give him such benefit of the verdict as he had power to give him, in addition to that benefit which might be obtained by attachment for non-performance of the award. The plaintiff does not complain of it: if it is an evil, it operates against the plaintiff and not the defendant, and I think the defendant cannot object to the award on that ground.

With respect to the gross sum being given for the annuity, it appears to me that the arbitrator had the power on this submission to award the value of the annuity. The declaration states a contract to grant an annuity to be secured in a particular way at a certain time. When the contract is broken, it is competent to the parties to agree that the arbitrator shall put the grantee in the situation that he would have been in, if the defendant had given the security which he contracted to give. I think it is abundantly clear, under this rule of reference, that the arbitrator had the power to award what he should think fit and proper; and it would be a salutary provision that he should have that power, in order to put an end to future litigation.

Then, with respect to the bankruptcy, it is suggested that it is a revocation: it appears to me that the arguments are entirely against its being a revocation. I don't see how the circumstance of a party becoming a bankrupt after he has entered into a contract, should put an end to and disturb the pecuniary interests which the other persons had in the contract. It is not, at all events, a ground for setting aside the award; for the defendant may contest the matter in another way if the objection be well founded. I think on none of these grounds the application ought to prevail.

Rule discharged, with costs.

HOBDELL against MILLER.—p. 292.

An arbitrator, to whom a cause had been referred, found all the issues, one of which was an issue on a set-off, in favour of the plaintiff, and assessed general damages on such finding; he ordered a certain sum and costs to be paid on a Sunday, and before defendant could have an opportunity of moving to set aside the award: Held, that these were no grounds for setting aside the award.

THIS cause was referred to an arbitrator, who found all the issues in favour of the plaintiff; assessed general damages on such finding; and ordered the defendant to pay a sum of money and costs on the 1st of December, 1839, which fell on a Sunday.

Dowling moved to set aside the award, on the ground that among the issues found in favour of the plaintiff was an issue on a set-off, on which damages could not be assessed; and yet the arbitrator had assessed damage on *all* the issues found for the plaintiff: that he ought not to have ordered costs to be paid in December, before the defendant could have an opportunity of applying to the Court to set aside the award; and still less to have required payment on a Sunday.

TINDAL, C. J. "Damages on all the issues," means, on all on which damages could be assessed: it is a little inaccurate, but very intelligible. As to the payment on Sunday, if the defendant pays on Monday he will not be attached; and the payment of the costs would not preclude an application to the Court.

Rule refused.

MURDOCH against TAYLOR.—p. 293.

Defendant being sued for rent arrear, and having received notice from a mortgagee not to pay the rent to plaintiff, obtained a rule for the mortgagee to interplead: the mortgagee having declined to appear to the rule, the Court ordered that each party should pay his costs of the rule.

DEBT for 6*l.* 6*s.* 0*d.*, rent arrear.

Blatch, claiming as mortgagee, gave notice to the defendant not to pay rent to the plaintiff; whereupon the defendant, upon an affidavit that he was ready to pay the rent but for the claim which had been made, obtained a rule nisi for Blatch to interplead. Blatch immediately gave up his claim, and declined to appear to this rule: but

Talfourd, Serjt., who appeared on behalf of the plaintiff, prayed that Blatch might be barred, and that the defendant might pay to the plaintiff his costs of the rule. The defendant could have no claim to costs except where the plaintiff had a remedy over against the wrongdoer: *Pitchers v. Edney*, 4 New Cases, 724, (33 E. C. L. R. 50.)

M^cMahon, *contra*, contended, that the defendant was entitled to his costs of the rule, either by an order on the claimant Blatch, or by an order on the plaintiff; for the fund, which here was the rent, was in sufficient. In cases like the present, Courts of Equity always indemnified the stakeholder; *Albrich v. Thompson*, 2 Br. Ch. Ca. 149; and the Courts of Law had adopted the same principle: *Duear v. Mackintosh*, 3 M. & Scott, 174; 2 Dowl. 734, (30 E. C. L. R. 283;) *Cotter v. The Bank of England*, *Ibid.* 180; 2 Dowl. 728, (30 E. C. L. R. 286;) *Parke v. Linnett*, 2 Dowl. 562; *Agar v. Blethyn*, 1 Tyrwh. & G.

160; *Reeves v. Barraud*, 7 Scott, 282. In those cases, it was true, the claimants appeared to the rule; but the equities of the stakeholder were not altered because the claimant refused to appear; for the Court might always deal with the fund in dispute, and where that was insufficient, might make an order on the claimant. Thus in *Bowdler v. Smith*, 1 Dowl. 417, where an adverse claim was set up to goods seized by the sheriff, who applied to the Court under the Interpleader Act, and the claimant did not appear, the Court barred his claim, and made him pay the judgment creditor his costs of appearing on the sheriff's rule. In *Perkins v. Burton*, 3 Tyrwh. 51, under similar circumstances, the claimant was ordered to pay the judgment creditor his costs, unless he showed cause within four days. Those cases we recognised in *Shuttleworth v. Clark*, 4 Dowl. 561; and though in *Lambert v. Cooper*, 5 Dowl. 547, where the claimant did not appear, the Court made each party pay his own costs, yet there the earlier decisions were not cited.

BOSANQUET, J. The first section of the Interpleader Act, 1 & 2 W. 4, c. 58, which gives the Court a general discretion as to costs, applies only to the case where the claimant appears. By the third section, if he fails to appear, the Court may declare him barred as against the defendant, but their jurisdiction as to costs is confined to orders between the defendant and the plaintiff. The Court, therefore, cannot order the costs here to be paid by the claimant. There is no fund in court; and it would be most unreasonable to order the plaintiff to pay the costs out of the rent he seeks to recover, because a third person has made a claim to it which he does not pretend to enforce.

ERSKINE, J. I am of the same opinion. This case falls within the third section, under which we can make no order as to costs against the claimant; and it would be unjust to make the plaintiff pay out of his rent costs occasioned by a claimant who does not even appear to enforce his claim.

MAULE, J. The third section, which alone applies to the present case, gives no authority to the Court to award costs except as between the defendant and the plaintiff. We cannot order them to be paid by a claimant who does not appear; and if they were to be paid by the plaintiff in cases such as the present, his whole rent, without any default on his part, might be absorbed by his tenant's listening to a claimant who never meant to proceed in a Court of Law.

Rule absolute, that the claimant be barred as against the defendant; that each party pay his costs of this rule; and that proceedings be stayed on payment of the debt and costs of the action.

TINDAL, C. J., was absent at the Privy Council.

ANDERSON against WESTON and BADCOCK.—p. 296.

In the absence of evidence to the contrary, a bill of exchange must be taken to have been issued at the time it bears date.

And where an endorsement bore no date, Held, that it was properly left to the jury to determine, from the circumstances attending the transfer of the bill, the time at which the endorsement was made.

THE plaintiff declared on a bill of exchange for 39*l.* 19*s.* 0*d.*, drawn on Edward Hickman, by the defendants, on the 2d of February, 1838, payable three months after date; endorsed by the defendants to James Anderson, and by him to the plaintiff; presented to Hickman, and by him dishonoured; whereof the defendants had notice.

Badcock suffered judgment to go by default.

Weston pleaded, first, that he, together with Weston, did not make the said bill of exchange, in manner and form, &c.; secondly,

That he did not with Badcock endorse the bill in manner and form.

At the trial before TINDAL, C. J., it appeared that on the 20th of March, 1838, a notice appeared in the Gazette, that the partnership between Weston and Badcock had been dissolved on the 29th of December, 1837, pursuant to an agreement between them and the award of an arbitrator, made January 30th, 1838. The bill and its endorsement were proved to be in the handwriting of Badcock, but no evidence was given, other than the date on the bill, to show that it had been drawn or endorsed previously to the 20th of March. The action was commenced in July, 1838.

It was objected on behalf of the defendant Weston, that some further evidence ought to have been given by the plaintiff to show that the bill was endorsed previously to the 20th of March, when the public received the first intimation of the dissolution of the partnership. TINDAL, C. J., left it to the jury to say whether the endorsement was made before or after that time, and a verdict was found for the plaintiff, with leave for Weston to move to set aside and enter a nonsuit instead, on the above objection.

Barstow having obtained a rule *nisi* accordingly,

Humfrey showed cause. There was no evidence of fraud in any of the transactions touching this bill; and where the transactions are not impeached, the general rule is, that instruments are presumed to have been written at the time they bear date. Thus in *Smith v. Battens*, 1 Moo. & Rob. 341, it was held that endorsement on a promissory note admitting the receipt of interest must be taken to have been written at the time the date expressed; in *Hunt v. Massey*, 5 B. & Adol. 902, (27 E. C. L. R. 230,) and *Goodtitle dem. Baker v. Milburn*, 2 Mees. & Welsb. 853, there were similar decisions with respect to a letter; and in *Sinclair v. Baggeley*, 4 Mees. & Welsb. 312, it was held, that a written paper, containing a statement of mutual accounts between a creditor and a bankrupt by whom it was signed, and bearing date previous to the bankruptcy, showing a balance due to the creditor, was *prima facie* evidence, as against the assignees, in an action brought by them against the creditor, that it was written at the time it bore date. It is true, that in *Dickson v. Smith*, 6 T. R. 57, where the defendant proposed to set off, against a demand by assignees of a bankrupt, cash notes of the bankrupt payable to the bearer, and dated before the bankruptcy, it was held that he must show they came to his hand before the bankruptcy; but that was not on the ground that the notes were not to be presumed to be written when they bore date, but that the defendant's set-off was not made out unless they were also delivered to him before that time. So in the case of assignees who are seeking to set up a right by proof of a petitioning creditor's debt, it must be shown that the subject of that debt was in existence before the bankruptcy; and therefore in *Wright v. Lainson*, 2 Mees. & Welsb. 739, the assignees were required to show that the

documents on which they relied to establish such debt was in existence before the bankruptcy. But a bill of exchange in an ordinary case must be taken to have been made and endorsed at the time it bears date. To hold otherwise would occasion great embarrassment in the mercantile world, and be inconsistent with the principle on which instruments thirty years old are admitted without proof of execution.

Barstow. Admitting, for the purpose of argument, that the rule is such as it has been described with respect to instruments which bear a date, yet where the instrument or signature which is to confer a title bears no date, the plaintiff must make out his case by showing it was in existence at a time which would give him a right to sue. Here, the endorsement, which constituted the plaintiff's title, bore no date: the plaintiff, who proceeded on the supposition of a partnership, was bound to show an actual or ostensible partnership at the time of the endorsement; but he showed neither; for the existence of a partnership in December did not entitle him to a presumption that it continued till February following, when the bill was drawn; still less till March, when the dissolution was announced in the Gazette. In *Smith v. Batten* the endorsements bore a date which till the transaction was impeached might be *prima facie* evidence that they were written at the time of the date; so, in the other cases, a date was expressed; here the endorsement bore no date, and the fairness of the transaction was impeached by the date of the bill and the circumstance that the party who drew and endorsed it had allowed judgment to go by default.

Cur. adv. vult.

Bosanquet, J. In the case of *Anderson v. Weston*, which was argued before my three learned brothers and self in the absence of my lord chief justice, I am to state the opinion of those judges who heard that case.

The cause was tried at Guildhall before my lord chief justice, and was an action on a bill of exchange, dated the 2d of February in the last year. It was an action against the defendants Weston and Badcock, as drawers and endorsers of that bill.

Badcock suffered judgment to go by default: Weston pleaded, first, that he did not draw; secondly, that he did not endorse: these were the two issues. It appeared that Weston and Badcock had been in partnership in business; that by agreement between themselves, they agreed to dissolve that partnership upon the 29th of December, 1838, but the dissolution was not advertised in the Gazette, or notified to the public until the 20th of March, 1839; so that, as far as the public were concerned, and as far as the holder of this bill was concerned, he had no notice of the dissolution of this partnership until the 20th of March, 1839, that is, about seven weeks after the date of the bill.

The bill was proved to have been written, signed, and endorsed in the handwriting of Badcock, who had suffered judgment by default; and the question was, whether there was sufficient evidence to affect Weston with being the drawer and endorser of this bill, Badcock having, as far as the public were concerned, authority to draw and endorse a bill in the name of the partnership as long as the public were not apprized of the dissolution of the partnership which he had been carrying on in conjunction with the other defendant. The bill being proved to be in his handwriting, and dated on the 2d of February, 1839, the question was, whether that was not *prima facie* evidence of its having

been drawn at the time it bore date. It was insisted on the part of the defendant Weston, that it was incumbent on the plaintiff to give some proof in order to show that the bill was made at the time it purported to bear date, or at least before the time when the dissolution of the partnership was made public. The question is, what is the general rule of law on the subject, where an instrument is proved to be in the handwriting of a party, and to bear a certain date; whether that is evidence as to the time of making the instrument;—that it is not conclusive evidence is perfectly clear;—the question is, whether it is not *prima facie* evidence.

Before I advert to any of the authorities on the subject, it is material to consider what has been the constant practice when instruments are produced at *nisi prius*, in proof of an issue which is to be tried between the parties.

Now, when a deed is produced, and the execution of that deed is proved by the subscribing witness, or by accounting for the absence of the subscribing witness by death or otherwise, and proving the signature, and that deed bears a date, as far as my experience goes, that date has uniformly been taken to be *prima facie* evidence that the deed was executed at the time when it purports to bear date. It is the practice in cross-examination to inquire whether the deed was executed when it bears date, but I certainly never heard it contended that it was part of the proof of the person producing the instrument not only to give evidence of the execution of the instrument, but in the first instance, and before any evidence is offered to render doubtful the time of making the instrument, that it was executed at the time it bears date.

This is the case not merely with respect to instruments binding on the person of the party in the cause, but also with respect to his title where a deed of conveyance comes from third parties.

But there is another case which may be put on the subject, which is a very strong one in proof of this being the general rule: that is this. It is a general rule that an instrument 30 years old proves itself, provided it be produced from the proper custody: if an instrument be produced from a custody where deeds of that description ought to be, then if the instrument be 30 years old, there is no necessity for further proof.

What is the meaning of its being 30 years old? Parties are not called on to prove that that deed has been in existence for 30 years; if it bears date 30 years before the time of its production, the course is, unless it be impeached, to receive that as proof of the instrument.

There is one exception to which there are several cases which apply; it is not necessary to go through them in detail; that is, where a bill or note is produced for the purpose of proving a petitioning creditor's debt to support a proceeding in bankruptcy: in that case, though there may be some variations between the different decisions relating to that subject, I apprehend it may be taken to be now settled that some evidence besides the date is necessary to show that the instrument produced for that purpose had its existence before the act of bankruptcy took place. But the ground for requiring that proof appears to be a very reasonable and substantial one, which is this; that a proceeding in bankruptcy differs from an ordinary suit. The effect of a proceeding in bankruptcy is retrospective, and the object of it is to invalidate all transactions which have taken place between the act of bankruptcy and the time when the commission takes effect. In order, therefore,

to support such an instrument bearing date before the act of bankruptcy, it may well be necessary to give evidence in addition to the date.

On the other hand, there are several cases which appear to recognise the general rule. I will first advert to that which has been established by a variety of decisions, as having been the rule of law prior to the late statute 9 G. 4, c. 14, s. 3, I mean the reception of the endorsement, in the handwriting of the holder of the instrument, of the receipt of interest, or of part of the principal, with a date annexed to such endorsement, for the purpose of showing that there has been an acknowledgment of the transaction within the period to which the Statute of Limitations will apply. That was established as a rule by cases in the House of Lords, and came before my brother TAUNTON, in the case of *Smith v. Battens*, 1 Moo. & Rob. 341, where the endorsement was prior to the statute of George IV. There had been a question with respect to the propriety of the reception of such endorsements, considering by whom the endorsements were made—by the party himself and for his own benefit. That question has now been put an end to by the statute. But the case, as far as it goes, appears to me to recognise this principle, that if the memorandum or the endorsement be itself receivable, and not objectionable on account of the person who made it, then the date expressed is taken to be the time when the money was received. The case before my brother TAUNTON was this. The note, when produced, had several endorsements upon it, purporting to be receipts for payment of interest: they were unsigned; and the last bore date before the 1st of February, 1829, and within six years before the commencement of the action. A witness was called who proved that, in January, 1831, Elizabeth Hill placed the note in his hands, then having these endorsements upon it. It was objected for the defendant, that it should be shown in whose handwriting the endorsements were made, and also that they were made before the 1st of January, 1829, inasmuch as by the statute 9 G. 4, c. 14, s. 3, such endorsements made after that day could not be received in evidence for the purpose of taking the case out of the Statute of Limitations, if they were made by or on behalf of the plaintiffs. My brother TAUNTON, in stating his opinion, says, "I entertain some doubt as to the first point; but, upon the whole, I think that the delivery by Mrs. Hill of the note with the endorsements then upon it, is evidence that they were made by her authority; if so, it is the same thing as if those endorsements had been written by her own hand. As to the time, I have no doubt; if the endorsements were not written at the time they purport to bear date, it lies on the defendant to prove it: in the absence of all evidence to the contrary, I shall assume that they were written at the time they bear date." Clearly, therefore, it recognizes the general principle, provided the endorsement itself had been received.

There is another case of *Hunt v. Massey*, 5 B. & Adol. 902, (27 E. C. L. R. 230.) That was the case of an action brought on a bill of exchange for 101*l*. The defendant pleaded infancy, and proved that at the time he accepted the bill he was under age. A letter was then produced written by him, which bore date subsequent to the time of his coming of age, and requested a friend to pay the plaintiff 101*l*. It was objected that the defence being infancy, and there being no other proof

of the defendant's having acknowledged the acceptance but his letter, bearing date subsequently to his majority, that letter might have been written by him at the same time he executed the acceptance, for the purpose of satisfying the tradesman on the subject. Some proof, therefore, ought to have been given to show that that writing was subsequent to his majority. However, the Court held that the letter must be taken to have been written at the time it bore date.

There is, then, another case which appears to me to be a strong one, which was decided recently in the Court of Exchequer: the case of *Sinclair v. Baggaley*, 4 Mees. & Welsb. 312. That was an action brought by assignees of a bankrupt against a person indebted to the bankrupt: the defendant produced an account drawn up by the bankrupt; and in the result of that account, taking the dates to be true, the balance was in favour of the defendant. It was objected that the assignees were not to be bound by an act of the bankrupt which might have taken place after the act of bankruptcy, and, therefore, some proof ought to have been given to show that that account was drawn up before the act of bankruptcy. However, the dates in the account purporting to be before the act of bankruptcy, the Court held that, unless there was something to impeach the proof of those dates, they must be taken to be *primâ facie* true, and, therefore, that the defendant was entitled to judgment.

This case, then, recognises the general rule; and, on these grounds, my learned brothers and myself are of opinion that, unless the date of the instrument be impeached by evidence, it shall be considered the true date.

So far as to the date of this bill of exchange. The next question is one on which it is not necessary to say much. It is, that there was no proof when the endorsement was made: that the endorsement might have been made as well after the time when the dissolution of partnership was notified to the public, as before: and if this were to be treated as a point of law merely, as to the *primâ facie* effect of the endorsement, it would not stand on the same footing as that of the date of the instrument, because the endorsement bears no date: but the lord chief justice did not so consider it, because he left the circumstances of the case to the jury, for them to say whether or not in their opinion the endorsement was made before or after notice of the time of the dissolution of partnership.

The circumstances of the case were, that the agreement for dissolution of partnership was executed on the 29th of December, that the notification of it to the public was not made till the 20th of March following, and that the bill was made payable to the drawer's own order. The question left to the jury was this, whether it was not sufficient to satisfy them that the bill had been issued shortly after the time it bore date, that the drawers of the bill themselves were the payees of it and the endorers. For what purpose could a mercantile house draw a bill payable to themselves, and endorse it, unless for the purpose of either paying away money immediately, or very shortly after, or of raising money, or of making use of the bill in some way or other?

This was left to a jury conversant with matters of business, and they found that to be a very just inference: but that is not the question here. This is a motion to enter a nonsuit; and the question, therefore, is, whether there was any evidence to go to the jury that that endorsement

was prior to the time when the notice of the dissolution of partnership appeared. For the reasons given, we think there was, and therefore this rule must be

Discharged.

KNOCKER against BUNBURY and Wife, and Others.—p. 306.

Testator, possessed of real and personal property, desired his executors, out of such moneys of his as might come to their hands, to purchase two annuities for W. and her children: with regard to the rest of his property, of what kind soever, he desired his executors after payment of his debts, to pay and make over the whole to his daughter M., the wife of B., and to the children of his daughter after her decease: Held, that the executors took a power to settle the freehold property upon the daughter for life, with remainder, after her decease, to her children and their heirs.

By order of the Vice-Chancellor the following case was submitted for the opinion of this Court:—

By an indenture of lease, bearing date the 17th of August, 1706, and made between James Butler, therein described, of the one part, and Thomas Bunbury, of the other part, the said J. Butler granted, demised, and to farm let unto the said T. Bunbury, all that the town and lands of Cronevounan, containing by estimation 461 acres, situate in the county of Carlow, in Ireland, as fully and amply as the same were then lately held by John Dillon and his undertenants, with their appurtenances, to hold the same unto T. Bunbury, his heirs and assigns, during the lives of the several persons therein named; and in the indenture there was a covenant for the perpetual renewal of the lease in the manner and upon terms therein mentioned.

The lease had from time to time been renewed upon the dropping in of the lives named in the lease and in the subsequent renewals thereof, pursuant to the covenant in the indenture of lease contained, and by divers mesne conveyances and assurances, the premises mentioned in the indenture of lease were vested, at the time of the date of the indentures next hereinafter set forth, in Mary Bunbury, for the lives of his royal highness Prince Adolphus Frederick, Hugh Mill Bunbury, and Humphrey Freestone, and the life of the survivor of them.

By certain indentures of lease and release, bearing date respectively the 27th and 28th of April, 1808, the release made between the said Mary Bunbury, of the one part, and Welsh Hamilton Bunbury, of the other, for the considerations therein mentioned, the said M. Bunbury gave, granted, released, assigned, transferred, and set over unto the said W. H. Bunbury, his heirs and assigns, all the town and lands of Cronevounon, described and comprised in the indenture of lease, of the 17th of August, 1706, to hold the same and the said indenture of lease, unto and to the use of W. H. Bunbury, his heirs and assigns, during the continuance of the said lease for lives, with renewal forever.

The said W. H. Bunbury being seised and possessed of the said lands, duly made and published his last will and testament in writing, attested by three witnesses, and bearing date the 30th of April, 1833, as follows:—"I, Welsh Hamilton Bunbury, being at this time in sound mind, do hereby nominate John Holcombe and William Knocker, executors of this my last will and testament. I desire my executors to purchase

out of such moneys belonging to me as may come to their hands, the sum of 100*l.* per annum, to be paid by them to Mrs. Ann Witherington, the widow of the late Colonel Witherington, during the term of her natural life; and I desire them to purchase the further sum of 100*l.* per annum, to be paid in equal portions, during the term of the natural life of each, to the children of the said Mrs. Ann Witherington and of the late Colonel Witherington. And with regard to all *the rest of my property of what kind soever, I do hereby desire my executors, after payment of my just and lawful debts and funeral expenses, to pay and make over the whole to my beloved daughter, Mary Diana Bunbury, the wife of Henry Mill Bunbury, of Marlston, Berkshire, and to the children of my said daughter after her decease.* Witness," &c.

The testator departed this life shortly after the date of his said will, without having revoked or altered the same, and leaving the said M. D. Bunbury, his only child and heiress at law, him surviving.

The questions for the opinion of the Court were,

First, Whether the executors of the testator took any and what estate or interest under the will in his said freehold property; and if not,

Secondly, Whether, under the will, they had any and what power over the said freehold property.

The case was argued in Trinity term by

R. V. Richards for the plaintiff.

The executors take the legal estate in the lands in question, under this will, or at least a power over them, to be exercised under the will.

The word property is as comprehensive as the word estate, under which the legal interest in land has been constantly held to pass in devises where no expressions are to be found in the will to control such a construction: and none such can be pointed out here. The object of the testator was to provide for his daughter and her children living at her decease, out of his landed estate; and accordingly he desires his executors to pay the annuities bequeathed to friends out of *moneys* that may come to the executors' hands; but the rest of his property, after payment of his debts, he desires them to make over to his daughter. That property, the lands in question, they could not make over, or pay debts out of it, unless the legal estate were in them; and the order to make it over, after payment of debts, charges the real estate. 2 Jarman's Powell on Devises, c. 34, p. 646. At all events, the executors must have had a power to effect these objects, for the intention is clear, and no particular form of words is essential to the creation of a power. In *Patton v. Randall*, 1 Jac. & W. 189, which may be cited for the defendants, the executors were held not to take an implied power of sale where the estate was given to other persons, though the testator had directed a sale on certain events which the minority of the devisees prevented: here, the land is not given to any other person, but the executors are desired to make it over. It can scarcely be contended that the testator proposed to die intestate as to his real estate.

Stephen, Serjt., for the defendants.

There is no disposition of the testator's real estate in this will; and if there be any, it is only the grant of a power to the executors to make it over to the testator's daughter in tail.

It has, indeed, been often decided that the word *property* is sufficient to pass real estate; but that has not occurred in any case where the word has been employed in a devise of a residue; nor where the

devise has been to an executor. And the heir cannot be disinherited unless by express words or necessary implication: *Moone v. Hease-man*, Willes, 138. In *Doe dem. Morgan v. Morgan*, 3 Tyrwh. 179, 1 C. & M. 235, it is true, Lord TENTERDEN said that land will pass to a devisee under the word *property*, unless a clear intention be expressed to the contrary; but that is the first case which has gone so far against the heir; and no intention to pass real estate under the word *property* can be collected from this will; for the word *property* is not more comprehensive than the word *estate*, which, when employed in a devise of the residue, has been held not to pass land if preceded or accompanied with language descriptive of personal property: *Cliffe v. Gibbons*, 2 Ld. Raym. 1324; *Marchant v. Twisden*, Gilb. Eq. Cas. 30; *Doe dem. Bunny v. Rout*, 7 Taunt. 79, (2 E. C. L. R. 32;) *Camfield v. Gilbert*, 3 East, 516; *Bebb v. Penoyre*, 11 East, 160; *Roe dem. Hel-ling v. Yeud*, 2 N. R. 214; *Doe dem. Spearing v. Buckner*, 6 T. R. 610; *Doe dem. Hurrell v. Hurrell*, 5 B. & Ald. 18, (7 E. C. L. R. 8;) *Chap-man v. Prichett*, 6 Bingh. 602, (19 E. C. L. R. 174.) In *Doe dem. Wall v. Langlands*, 14 East, 370, there was nothing to restrain the effect of the word *property*, and the personal estate was not sufficient to pay debts and legacies. Here, the previous direction is to purchase an annuity out of the testator's *moneys*; the executors are then to make over the residue of his property: there is no gift to them or to any other person; and they can only make over what they take in the capacity of executors. Thus, in *Bebb v. Penoyre*, it was held that the fee did not pass by a residuary clause, whereby the testator, after several pecuniary bequests, ordered the lease of his house, with his furniture, to be sold, and all the rest and residue to be divided amongst other persons, and appointed executors; for such division of the rest and residue must be intended to be made by the executors as such, and therefore to be confined to personal property. And the expression *make over* is applicable rather to personal than real property: if the testator had meant real property he would have used the word *convey*.

As to the argument that the executors take the real estate here in order to effect the testator's directions as to the payment of debts, in all the cases collected in 2 Powell on Devises, 646, in which such direc-tions were held to be a charge on the land, there was an express devise of the realty. Here there is no such devise, and the debts must be paid out of the assets that fall to the executors. The case falls within the second exception stated by Powell, p. 654,—“where debts are directed to be paid by the executors, unless land be devised to them, it will be presumed that the payment is to be made exclusively out of funds which by law devolve to them in that character.”

Distinctions have been made between a devise by a testator that his executors shall sell his land, and a devise of his lands to his executors to be sold, the former expression having been held to convey a naked authority, and the latter an authority coupled with an interest: Co. Lit. 181, b; Sugd. on Powers, 103, 2d. edit. The expression *make over* is less comprehensive than either, and these executors take neither a power nor an interest. But,

Secondly, If they take any power, it is a power to settle an estate tail on the testator's daughter; for where lands are devised to a person and his children, if he has no children at the time of the devise, he takes an estate tail: *Wild's Case*, 6 Rep. 17; *Seale v. Barter*, 2 B. & P. 485.

It may be contended that, as the devise here is to the testator's daughter and her children, *after her decease*, the daughter will take an estate for life only, the remainder to her children in tail; and Powell, in his observations on *Seale v. Barter*, seems to be of that opinion;—vol. ii. p. 502;—but he was possibly misled by the view he took of *Doe dem. Dary v. Burnsall*, 6 T. R. 30; *Doe dem. Gillman v. Elvey*, 4 East, 313; and *Ginger v. White*, Willes, 348; for, according to *King v. Melling*, Ventr. 225; and *Hodges v. Middleton*, Dougl. 431, such a devise would confer an estate tail on the first taker.

R. V. Richards, in reply. In *Doe dem. Wall v. Langlands*, Lord ELLENBOROUGH says, "that *property* is a term sufficient to pass real estate, when used in a last will, is not disputed; and the question is, whether the generality of its signification be restrained by any other words in the same instrument, or whether from the whole texture of the will, or from any particular clauses in it, an intention in the testator to use it in a more confined sense can be made appear." Here there are no words or clauses, or any thing in the texture of the will, to indicate an intention so to confine the extent of the word *property*; and therefore the cases referred to for the defendants are inapplicable. In *Roe dem. Helling v. Yeud*, and *Doe dem. Bunny v. Rout*, the words "all other my property" were preceded by words descriptive of personal property. In *Doe dem. Spearing v. Buckner*, the expression was "the rest of my estate and effects; in *Camfield v. Gilbert*, "the residue of my effects;" *Doe dem. Hurrell v. Hurrell*, was a bequest of the residue of the estate, in trust to sell. Here, there is no previous or subsequent enumeration of particular kinds of property, but a simple direction to make over to the testator's daughter, and her children after her decease, the rest of the testator's property, after payment of his debts. Powell says, vol. ii. p. 159, that *Cliffe v. Gibbons* is inconsistent with *Doe dem. Wall v. Langlands*, and *Tanner v. Morse*, Cas. Temp. Talb. 284; and that no case has gone so far in restraining the word *estate* as *Marchant v. Twisden*. If the executors took only a power, then that power was to convey to the testator's daughter for life only, with remainder to her children in tail. There is no other construction by which effect can be given to the words "*after her decease*;" those words imply that the daughter should take only an estate for life: 2 Jarman's Powell on Devises, 502.

The following certificate was sent at the conclusion of this term:—

We are of opinion, first, that the executors of the testator, W. H. Bunbury, took no interest under the will of the said testator in his said freehold property. But, secondly, that, under the said will, they have a power to settle the said freehold property upon the daughter of the testator for life, with remainder, after her decease, to her children and their heirs.

N. C. TINDAL. T. COLTMAN. T. ERSKINE.

The POULTERS' Company against PHILLIPS.—p. 314.

The Company of Poulters comprises all poulters in London and within seven miles thereof, and no one can be of the livery of a company unless he be a freeman of the city of London: Held, that a by-law authorizing the company to admit into the livery of the company any freeman of the company, was a valid by-law, and must be intended to imply any freeman of the company who was also free of the city.

THE declaration alleged that their Majesties William and Mary, by letters patent of the fourth year of their reign,—after reciting that the late company of poulterers, London, was an ancient company, and had enjoyed divers privileges and immunities by virtue of several charters and letters patent to them granted by their Majesties' royal predecessors,—did will, ordain, constitute, declare, grant, and confirm, (amongst other things,) that all and singular persons using the trade of mere poulterers, or selling poultry wares, coneyes, butter and eggs, within the city of London and liberties thereof, or within seven miles of the said city, from time to time for ever thereafter, were and should, by virtue of those presents, be one body corporate and politic, in deed and name, of Master, Wardens, and Assistants of Poulterers, London; and, among other things, that there should be one of the company aforesaid, in manner and form thereafter in those presents mentioned, to be chosen and named, who should be and be called the Master of the said company; and that likewise there should be from time to time for ever thereafter two of the said company, in manner and form thereafter in those presents mentioned, to be chosen and named, who should be and be called the Wardens of the said company; and also, that there should be from time to time for ever thereafter, sixteen others of the company aforesaid, in manner and form thereafter expressed to be chosen and named, and who should be and be called the Assistants of the said company, to be from time to time assisting and aiding to the master and wardens of the company, for the time being, in all causes, matters, and business touching or concerning the said company; and that it should and might be lawful to and for the said master, wardens, and assistants of the said company for the time being, or the greater part of them,—whereof the master and one of the wardens for the time being should be always two,—as often as they should think it needful or expedient, to assemble themselves together at and in their hall, or any other convenient place within the said city of London, and there from time to time, and at all convenient times thereafter, to ordain and make such reasonable laws, acts, orders, ordinances, and constitutions in writing, as to them, or the greater part of them, then and there assembled—whereof the master and one of the wardens aforesaid for the time being should be two—should seem fit and convenient, according to their best discretion, for or concerning the good estate, rule, order, and government of the said company, and of every member thereof; and in what order and manner the said master, wardens, and assistants, and all and every other person and persons, being free of the said company, within the limits aforesaid, should demean and behave themselves, as well in all and singular causes and things touching or concerning the said company, or anything thereunto appertaining, as also the master, wardens, and assistants in their several offices, mysteries, and functions touching or concerning the said company as aforesaid; and all and singular such pains, penalties, punishments, fines, and amerciaments, or any of them, against or upon any offender or offenders, which should transgress, break, or violate the said constitutions, statutes, laws, ordinances, or orders so to be made, ordained, and established, or any of them, to impose, provide, and limit, and the same and every part and parcel thereof, to ask, levy, take, and recover to and for the use of the said company, by way of distress or by action of debt, or otherwise by any other lawful ways or means against the said offender or offenders, his, her, or their goods or chattels, or any of

It may be contended that, as the devise here is to the and her children, *after her decease*, the daughter with life only, the remainder to her children in tail; and variations on *Seale v. Barter*, seems to be of that order—but he was possibly misled by the view he *v. Burnsall*, 6 T. R. 30; *Doe dem. Gillm* and *Ginger v. White*, Willes, 348; for, according to *Ventr. 225*; and *Hodges v. Middleton* would confer an estate tail on the first tenant. *R. V. Richards*, in reply. In *Doe* ELLENBOROUGH says, “that *property* estate, when used in a last will, is whether the generality of its signification is to be taken from the words in the same instrument, or from any particular word in the will, or from any particular circumstance provided. The declaration then, to use it in a more confined sense, is not a patent, and that the said company are no words or clauses, or a declaration of a livery company of the said city of London, made on the 30th of May, 1692, at an assembly or therefore the cases referred to in the said declaration, and assistants of the said Company *dem. Helling v. Ye* held at a certain place called Innholders’ “all other my property” gardens, and assistants of poulterers, London, personal property. In *T* did constitute, order, and make a certain was “the rest of my” in writing, for, touching, and concerning the good residue of my *effect* and government of the said company, and of every of the residue of the said company, which said ordinance was not nor is repugnant or contrary or subsequent error, which is agreeable to the laws and statutes of this realm in direction to make, and that the master, wardens, and assistants of the said company, at the time being, or the more part of them, from time to time debts. Pow *and* thereafter, when and so often as they should think consistent with the said ordinance, should and might call, nominate, choose, and Cas. Temr *and* find it needful, should and might call, nominate, choose, and the word *and* the livery or clothing of the said company such and so many a power *and* persons, being *freemen of the said company*, as they should meet, honest, and of ability to be called and admitted into the life or *and* livery; and that every such person so called and chosen should const *and* pay to the master, wardens, and assistants of the said company, for the time being, to and for the use of the said company, for his dece *and* into the livery of the said company, the sum of 20*l.* of lawful est *and* money of England, to be employed according to the custom and usage of the said city of London, and should also pay to the clerk of the said company for the time being, for the entering and registering his name in the books of the said company, the sum of 5*s.*, and to the upper beadle of the said company for the time being the sum of 1*s.* 6*d.*, and to the under beadle 12*d.*; and that every person that should be so called, elected, and chosen into the livery, and should refuse or deny to be of the same livery, not having any such lawful, just, or reasonable cause or let to excuse such his refusal or denial, as by the master, wardens, and assistants of the said company for the time being, or the more part of them,—whereof the master of the said company for the time being should be one,—should be thought and adjudged sufficient, should, for every time of such his refusal or denial forfeit and pay to the master, wardens, and assistants of the said company, for the time being, to and for the use of the said company, the sum of 10*l.* of good and lawful money of England, unless he should, before the master and wardens of

for the time being, or the more part of them,—the said company for the time being should be take his corporal oath that he was not *bona fide* marks, as in and by the said ordinance, would, amongst other things, more fully towards, to wit, on the 18th of April, said late sovereign Lord and Lady, amongst other ordinances and, as, according to the statute in that, approved of, and confirmed by the MERS, Knight, then Lord Keeper of the Right Honourable Sir JOHN HOLT, Knight, of their said late Majesties' Court of King's Honourable Sir GEORGE TREBY, Knight, then their said late Majesties' Court of Common Pleas: several premises the defendant afterwards had notice: of March, 1828, the said defendant was duly admitted of the said company, and then and there became, and thereforth hitherto continually had been, and still is, a free- the said company; and the said defendant afterwards, and before call, nomination, and choice hereinafter mentioned, to wit, on the day last aforesaid, became admitted to the freedom, and became and was a freeman of the city of London as a poulter, and so continued down to, and at, and after the time of the default of the said defendant hereinafter mentioned: That on the 29th of March, 1838, the defendant was nominated into the livery of the company, of which he had notice, and was required to attend at a court on the 28th of June, 1838, to be admitted into the said livery: That though he had no excuse, he refused to attend the court to be admitted into the livery, and never took it upon himself; whereby an action accrued to the master, wardens, and assistants of the poulters to demand and have of him 10*l*. Breach, nonpayment.

General demurrer and joinder.

Mellor, in support of the demurrer. The by-law set out on the declaration is ill, for it imposes a fine on every freeman of the company who, when called on, refuses to be admitted into the livery of the company. Now, none but freemen of the city of London are competent to be liverymen of any of the chartered companies. The Poulters' Company comprehends all poulters in London and within seven miles of the city, many of whom are not freemen of the city; so that, according to the by-law, a person not eligible to be a liveryman might be fined for refusing to enter the livery to which he could not legally belong. No one can be a freeman of the city unless by birth, servitude, or redemption; *City of London's Case*, 8 Rep. 241; and every person, to be free of the city, must be a member of some company; *Innholders' Company v. Gledhill*, Sayer, 274; but a by-law imposing a fine for refusing to accept the livery of a company must be confined to such freemen of the company as are freemen of the city. *Kyd on Corporations*, 392. Therefore, in *The Mayor of Oxford v. Wildgoose*, 3 Lev. 298, a by-law, which imposed a fine upon any person who should refuse to accept an office in the company to which he belonged, was held void. That case, it is true, was overruled by the *London Tobacco-pipe Makers' Company v. Woodroffe*, 7 B. & C. 838, (14 E. C. L. R.,) which decided that a

by-law, imposing a fine on *any person* who should refuse to accept the office of warden, was valid: the tobacco-pipe makers' case, however, is distinguishable from the present, for the by-law there affected only the office of warden of the company, and was not incompatible with any regulation of the city; whereas here, the question is, whether the company can call on any of its members to be a liveryman, when the regulations of the city—of which the court will take notice, *Com Dig. Franchise*, F. 26,—prescribe that none shall be a liveryman who is not also a freeman. There is no necessity that the company should have the power they assert, for the court of aldermen has the right of fining for a refusal to accept the office of liveryman; *The Company of Vintners v. Clerke*, 1 Salk. 349, 5 Mod. 156, 319, Comb. 411; and the common council has jurisdiction over all the companies: *Rex v. Harrison*, 3 Burr. 1322, *City of London's Case*. The by-law, therefore, is an alteration of the constitution of the company, and an excess of its jurisdiction by an attempt to regulate the livery. If the by-law be bad in part, it is bad in the whole; *Stationers' Company v. Salisbury*, Comb. 221, even though it has been allowed by the judges: *Rex v. Faversham Fishermen's Company*, 8 T. R. 352. In the *Vintners Company v. Passey*, 1 Burr. 235, which was an action of debt on a by-law for refusing a livery, the present objection was not taken, and the attention of the judges was not called to the point: the only objection taken was that the by-law was oppressive. And the Court will not favour these chartered companies or mysteries, which, if useful in the barbarous times in which they originated, are wholly unsuited to the wants of the present day, and destructive of that free competition which in every craft is the best promoter of excellence and cheap supply.

Barstow, contra, admitted that none could be a liveryman who was not free of the city, but contended that, under a reasonable construction, this by-law could only be intended to apply to such members of the company as were freemen of the city; and the case could not be distinguished from *The Tobacco-pipe Makers' Company v. Woodroffe*. That case, indeed, went further than the present, for the by-law imposed a fine on *any person* who should refuse to accept the office of warden; but Lord TENTERDEN said, "the condition of eligibility is from the subject-matter necessarily implied, and the word person must be considered as confined to *eligible* persons." That principle applied as well to liverymen as officers of the company.

Mellor, in reply. In the case of the Tobacco-pipe Makers' Company it appeared by the by-law that the warden must be chosen out of the assistants; therefore *any person*, in that case, might well be read any eligible person; but here the Court will not undertake to supply what the by-law has omitted to define.

Cur. adv. vult.

TINDAL, C. J. The question in this case arises on the validity of a by-law made by the master, wardens, and assistants of poulterers, London, bearing date the 13th of May, 1692, by which it was ordered and established that the master, wardens, and assistants, for the time being, or the more part of them, might call, nominate, choose, and admit into the livery or clothing of the said company, such or so many person or persons, being freemen of the said company, as they should think meet, honest, and of ability to be called and admitted into the same livery; and imposing a penalty of 10*l.* upon every person so called, elected, and chosen who should refuse or deny to be of the same livery, not having

such reasonable or just cause for such refusal or denial, as by the master, &c., should be thought sufficient. And the objection taken to the legality of this by-law, upon a general demurrer to the declaration, is this, that it empowers the company to call into the livery and clothing of the company members of the company not being freemen of the city of London; whereas by law such persons only as are freemen of the city of London, as well as freemen of the company, are qualified to be called into the livery or clothing of the company.

It was agreed by both the learned counsel who argued the case, that before a person can be admitted a liveryman of any of the companies he must be a freeman of the city of London; and as the incorporation of this company extends to and includes all persons from time to time using the trade of poulterers within the city of London and liberties thereof or within seven miles of the same city, it follows that there may be many of the freemen of the company who are not freemen of the city of London. If, therefore, this by-law is to be construed strictly by the letter, and to be held to give the master, wardens, and assistants the power of calling into the livery of the company *all* such persons, being freemen of the company, as they should think fit, it would extend to such persons who, by the law and custom of the city, could not be of the livery of the company, by reason of their not being free of the city, and consequently such by-law must be held to be void, upon the authority of the opinions of FOSTER, J., and WILMOT, J. on this same precise point, taken in the *Innholders of London Company v. Gledhill*, Sayer, 274. But we think the words of the by-law must receive a reasonable construction, and that a condition, that the freemen of the company who are called to the livery must be such freemen only as are eligible by law, is necessarily to be implied from the subject-matter of the by-law. Such was the decision of the Court of King's Bench in the case of *The Tobacco-pipe Makers' Company v. Woodroffe*, in which the former case of *The Mayor of Oxford v. Wildgoose*, 3 Lev. 293, is in express terms overruled. And we cannot distinguish the present case upon principle from that of the Tobacco-pipe Makers' Company above referred to.

We therefore think the by-law stated in the declaration is good, and that there must be

Judgment for the plaintiffs.

END OF HILARY TERM.

HILARY VACATION.
IN THE EXCHEQUER CHAMBER.

The Gas Light and Coke Company against TURNER.—p. 324.

Error from the Court of Common Pleas.

Held, a good plea in covenant on a lease, that the lease was entered into by plaintiff and defendant, and that the premises were let to defendant for the express purpose of being used by defendant in drawing oil of tar and boiling oil of tar, contrary to the provisions of the statute 25 G. 3, c. 77.

THE declaration stated, that on the 13th of August, 1833, by a certain indenture sealed with the common seal of the plaintiffs, and then made between the plaintiffs of the one part, and the defendant and one William Shackell and one Benjamin Hopkinson of the other part, the plaintiffs demised to the defendant and W. Shackell and B. Hopkinson, their executors, administrators, and assigns, certain tenements and premises, with the appurtenances, particularly described in the indenture, for the term of twenty-one years, at the yearly rent of 300*l.* Covenant by the defendant to pay the same; and breach by nonpayment. There was a second count upon an agreement under seal, bearing date the same day and year as the lease, and made between the same parties, by which agreement, after reciting the lease, the defendant covenanted that he would purchase of the plaintiffs at least 100,000 gallons of tar yearly, to be deliverable and paid for at the places, and in the manner and in proportions specified in the agreement. Breach, refusal to purchase according to the agreement.

The defendant, in his plea to the first count, after referring to the statute 25 G. 3, c. 77, which makes it unlawful to boil turpentine or draw oil of tar, above the quantity of ten gallons at a time, in any work-house or place nearer to any other building than seventy-five feet, and averring that the premises demised were within the prohibited distance, pleaded—that the said indenture was made and entered into by and between the plaintiffs and the defendant, and W. Shackell and B. Hopkinson, in manner and form as in the first count mentioned; and the tenements and premises, with the appurtenances, in that count mentioned, were demised and let to the defendant and W. Shackell and B. Hopkinson, for the express purpose of being used for, and applied to the drawing of oil of tar or pitch by distilling and boiling tar, and of boiling oil and tar together by them in larger quantities than the quantity of ten gallons at one time of the said commodities respectively, contrary to the form of the said statute; whereby the indenture was wholly void in law.

To the second count he pleaded, that the tar and every part thereof in that agreement mentioned was to be supplied by the plaintiffs, and sold to the defendant and W. Shackell and B. Hopkinson, for the express purpose of being distilled and boiled in and upon the said tenements

and premises, with the appurtenances, in the first plea mentioned, demised to them, in quantities of above ten gallons at one time, contrary to the form of the said statute in the first plea mentioned: by means whereof, and by force of the said statute, the agreement was wholly void in law.

Demurrer to the first plea,—for that (among other objections) there was nothing alleged in the plea to show that the lessees were obliged to use the demised premises, or any part thereof, for the purposes mentioned in the plea; and that, by virtue of the said lease, the lessees were entitled to use the same for any purposes whatever: that an estate for twenty-one years passed to the lessees, and had not been, and could not be, divested out of them, by any purposes to which they might have chosen to devote the premises: that the act of parliament in the plea mentioned did not render the lease invalid; and that it did not appear in and by the indenture that the premises were demised for the purpose in the first plea mentioned:

To the second,—for that (among other objections) the lessees were not bound by the agreement, or otherwise, to consume the tar otherwise than in a lawful manner: that the lessees might, if they pleased, boil the tar in quantities of less than ten gallons at one time, or might resell the tar; and were not bound to violate the provisions of the act.

The Court below having given judgment in favour of the defendant, (a)

R. V. Richards now, on behalf of the plaintiffs, argued as before, that the lease itself disclosed no illegal purpose, and that the terms of it could not be varied by evidence *dehors* the instrument: that if there had been an illegal purpose, the defendant was not bound to carry it into effect, but rather to abandon it, and apply the premises, as he might have done, to a legal purpose: that there was no allegation of the illegal purpose having ever been carried into effect, or at least of the plaintiffs' having any cognisance of such a proceeding: that the lease itself was an executory and legal contract, and that, in the cases in which the courts had refused to enforce a contract on the score of illegality, the contract itself had been illegal and executed, and the party seeking to enforce it had been himself privy to the illegality. *Little v. Poole*, 9 B. & C. 192, (17 E. C. L. R. 355;) *Law v. Hodson*, 11 East, 300; *Bensley v. Bignold*, 5 B. & Ald. 335, (7 E. C. L. R. 121;) *Brown v. Duncan*, 10 B. & C. 93, (21 E. C. L. R. 29;) *Langton v. Hughes*, 1 M. & Selw. 593; *Clugas v. Penaluna*, 4 T. R. 466; *Armstrong v. Lewis*, 2 Cro. & Mee. 274; 4 M. & Scott, 1, (30 E. C. L. R. 331.) But in *Bowry v. Bennett*, 1 Campb. 348, (b) an action for the price of apparel was held to lie against a prostitute, notwithstanding the plaintiff knew her way of life; and Lord ELLENBOROUGH said, "It must not only be shown that he had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on." At all events, the contract was sufficient to pass an estate and bind the defendant to the payment of rent, for the plaintiffs could not recover in an ejectment resting on the illegality of their own contract. *Doe dem. Roberts v. Roberts*, 2 B. & Ald. 367; *Lord v. War-*

(a) See 5 New Cases, 666, (35 E. C. L. R. 264.)

(b) See also the cases cited in the note.

dell, 3 New Cases, 680, (32 E. C. L. R. 279.) In *Lightfoot v. Tenant*, 1 B. & P. 551, on which the Court below mainly relied, the contract on which the plaintiff sued was expressly declared void by the statute 7 G. 1, c. 21. Here the lease was a legal contract, and the plaintiffs ought not to suffer for any illegal conduct of the defendant of which they might be ignorant, and in which they could take no part.

Petersdorff, contrà, was stopped by the Court.

ABINGER, C. B. All the decisions show that, at common law, a contract entered into to effect an illegal purpose is void, and cannot be enforced; and it makes no difference that this contract is under seal. It seems to me to be a void lease, having been granted expressly for an illegal object: that is not denied, but is admitted by the demurrer. It is true that you cannot add to a contract under seal any thing to vary the contract; but you may show *dehors* the instrument that such contract was entered into for an illegal purpose: such proof does not vary the terms of the contract, but merely shows the illegal object. But I apprehend the lease here is a part of the illegal contract: the plaintiffs having agreed that the defendant should manufacture this tar, oil, and other illegal matters, upon the premises, the lease is executed for the purpose of enabling the party to carry on that intended project, and I think you cannot disconnect it. According to the cases cited, where a party has granted a lease providing for the execution of an unlawful thing, it makes no difference as to the illegality of the contract that the unlawful act has not been carried into effect: it appears to me, therefore, that there is no reason for reversing the judgment of the Court of Common Pleas.

LITLEDALE, J. I am entirely of the same opinion. Mr. *Richards* relies on the circumstance of the pleas containing no allegation that the unlawful object had been carried into effect; but if parties enter into a contract, you must take it that they enter into such contract to all its extent. It is true that the lease does not mention the purpose for which it was executed; but I apprehend it may be proved by evidence *dehors* the lease that the object of the parties was the carrying this purpose into effect, it having been pleaded that such was their object, and that allegation not having been denied. If the illegal object had been carried into effect, and the plaintiffs had taken issue upon the plea that the contract was entered into for an illegal purpose, the only difference would have been that the plaintiffs would have been beaten upon that issue of fact. It does not signify, as regards the sufficiency of the plea, whether the void contract has been carried into effect or not. In this case the plea expressly alleges that the indenture was entered into by and between the plaintiffs and the defendant, and the premises were demised for the express purpose of illegally drawing oil of turpentine. I apprehend the contract is equally illegal, whether the object of the parties was carried into effect or not. In my judgment the plea is good; and the decision of the Court of Common Pleas ought to be affirmed.

PARKE, B. I am of the same opinion as to those points that have been alluded to by my learned brothers; and as to the argument that the plaintiffs would not be entitled to recover in ejectment, that forms no part of the question to be decided by the Court.

PATTESON, J. I am of the same opinion. Certainly this case may

go farther than any that is to be found in the books, but I think it is quite right that it should.

GURNEY, B., and COLERIDGE, J., concurred.

Judgment affirmed. (a)

(a) Williams, J., and Rolfe, B., left the court during the argument.

FORMS OF WRITS,

As framed by the Judges, pursuant to the Statute 1 & 2 Vict. c. 110.

It is ordered, that the following forms of writs, framed by the Judges pursuant to the statute 1 & 2 Vict. c. 110, s. 20, (a) be used from and after the first day of next Easter term in the cases to which they are applicable, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case, may render necessary: and that in all cases in which the judgment is for a penalty, and the plaintiff seeks to obtain interest, there shall be a memorandum on the back or at the foot of the writ, directing the sheriff to levy the amount of the sum of money really due and secured by the penalty, and of the damages and costs recovered, and interest thereon, at the rate of £4 *per centum per annum*, from the time when the judgment was entered up; or, if it was entered up before the 1st of October, 1838, then from that day: and that, in the cases in which the amount for which the judgment has been given is less than the amount of the sum of money really due and secured by the penalty and the damages and costs recovered, and the interest thereon calculated as aforesaid, it shall be stated in the body of the writ that the sheriff is to levy interest at the rate of £4 *per centum per annum* from the — day of —; and on the back or at the foot of the writ there shall be a memorandum as above directed; and that, in the case of an assessment of further damages under a writ of *scire facias*, pursuant to the statute of 8 & 9 W. 3, it shall be stated in the body of the writ of execution that the sheriff is to levy interest on the damages assessed and costs taxed in that behalf at the rate of £4 *per centum per annum* from the day on which execution was awarded, unless execution was awarded before the 1st of October, 1838, and in that case from that day:—but it is further ordered, that any variance, not being in matter of substance, shall not affect the validity of the writ sued out.

No. 1.

Writ of Capias ad Satisfaciendum, in a Judgment in the Court of Queen's Bench, in an Action of Assumpsit.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof

(a) See 5 New Cases, page 366, (35 E. C. L. R.)

to satisfy A. B. £—— which the said A. B. lately, in our Court before us at Westminster, recovered against the said C. D. for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, together with interest upon the said sum of £——, at the rate of £4 *per centum per annum*, from the —— day of ——, in the year of our Lord ——, (a) on which day the judgment aforesaid was entered up, and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, on the —— day of ——, in the year of our Lord ——.

NOTE.—This and all other writs of execution may be made returnable on a day certain in term.

No. II.

Writ of Capias ad Satisfaciendum, on an Order of the Court of Queen's Bench, for Payment of Money.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of ——, greeting. We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £——, which lately, in our court before us at Westminster, by a rule of our said court, entitled, &c. [*as the case may be*], were by the said court ordered to be paid by the said C. D. to the said A. B., and further to satisfy the said A. B. interest upon the said sum of £——, at the rate of £4 *per centum per annum* from the —— day of ——, in the year of our Lord ——, (b) on which day the said rule was made, and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, on the —— day of ——, in the year of our Lord ——.

No. III.

Writ of Capias ad Satisfaciendum, on an Order of the Court of Queen's Bench, for Payment of Money and Costs.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of ——, greeting. We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £——, which lately, in our court before us at Westminster, by a rule of our said court, entitled, &c., [*as the case may be*], were by the said court ordered to be paid by the said C. D. to the said A. B., together with the costs of the said rule, which said costs were afterwards, on the —— day of ——, in the year of our Lord ——, taxed and allowed by our said court, at the sum of £——, and further to satisfy the said C. D. the said sum of £—— (c) together with interest upon the said two several sums of £—— and £——, at the rate of £4 *per centum per annum*, from the said —— day of ——, in the year of our Lord ——, (d) and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, on the —— day of ——, in the year of our Lord ——.

No. IV.

Writ of Capias ad Satisfaciendum, on a Judgment in an inferior Court in an Action of *Assumpsit*, removed into the Court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of ——, greeting. We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £——, which the said A. B. lately, in [*insert the style of the court*], by the judgment of the said court, recovered against the said C. D. for his damages which he

(a) The day on which the judgment was entered up; or if entered up prior to the 1st of October, 1838, say from the first day of October, in the year of our Lord 1838, omitting the words on which day the judgment aforesaid was entered up.

(b) The day on which the rule was made; or, if it were made prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838, omitting the words on which day the said rule was made.

(c) The amount of the costs taxed.

(d) The day on which the costs of the rule were taxed; or, if that were prior to the 1st of October, 1838, say from the first day of October, in the year of our Lord 1838.

had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and which judgment was afterwards on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [or of —, one of the justices of our said court before us at Westminster, as the case may be], in pursuance of the statute in such case made and provided; and the costs attendant upon the application for the said order and upon the said removal were, on the — day of —, in the year of our Lord, taxed and allowed by our said court before us at Westminster at the sum of £—, and further to satisfy the said A. B. the said sum of £— (a) together with interest upon the said two several sums of £— and £—, at the rate of £4 per centum per annum, from the said — day of —, in the year of our Lord —, (b) and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, on the — day of —, in the year of our Lord —.

No. V.

Writ of Capias ad Satisfaciendum, on an Order of an inferior Court for Payment of Money, removed into the Court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £—, which lately, in [insert the style of the court], by a rule of the said court, entitled, &c. [as the case may be], were by the said court ordered to be paid by the said C. D. to the said A. B., and which rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by an order of our said court before us at Westminster [or of —, one of the justices of our said court before us at Westminster, as the case may be], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £—, and also to satisfy the said A. B. the sum of £—, (c) together with interest on the said two said several sums of £— and £—, at the rate of £4 per centum per annum, from the said — day of —, in the year of our Lord —, (b) and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, on the — day of —, in the year of our Lord —.

No. VI.

Writ of Capias ad Satisfaciendum, on an Order of an inferior Court for Payment of a Sum of Money and Costs, removed into the Court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £—, which lately, in [insert the style of the court], by a rule of the said court, entitled, &c. [as the case may be], were by the said court ordered to be paid by the said C. D. to the said A. B., and also £—, for the costs of the said rule, by the said court also ordered to be paid by the said C. D. to the said A. B., which said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by an order of our said court before us at Westminster [or of —, one of the justices of our said court before us at Westminster, as the case may be], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £—, and also to satisfy the said A. B. the said sum of £—, (d) together with interest on the said three sums of £—, and £—, and

(a) The costs attendant upon the removal of the judgment out of the inferior court into the Court of Queen's Bench.

(b) The day on which the costs of removal were taxed.

(c) The costs of removing the rule of the inferior court into the Court of Queen's Bench.

(d) The costs of removing the rule from the inferior court into the Court of Queen's Bench.

£—, at the rate of £4 *per centum per annum*, from the — day of —, in the year of our Lord —, (a) and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, on the — day of —, in the year of our Lord —.

DENMAN.

N. C. TINDAL.

ABINGER.

J. LITLEDALE.

J. PARKE.

J. B. BOSANQUET.

E. H. ALDERSON.

J. PATTESON.

J. GURNEY

J. WILLIAMS.

J. T. COLERIDGE.

T. COLTMAN.

T. ERSKINE.

W. H. MAULE.

R. M. ROLFE.

(a) The day on which the costs of removing the rule from the inferior court were taxed.

MEMORANDA.—p. 336.

Thomas Wilde, Esquire, Q. S., who had been appointed her Majesty's Solicitor-General, received the honour of knighthood on the 19th of February.

On the 17th of February, *George James Turner* of Lincoln's Inn, *David Dundas* of the Inner Temple, and *Richard Bethell* of the Middle Temple, Esquires, were appointed her Majesty's counsel learned in the law, with precedence as follows:—the said *George James Turner* after *Robert Baynes Armstrong* of the Inner Temple, Esquire,—who was subsequently (February 21) appointed one of her Majesty's counsel, with precedence next after *Griffith Richards*, Esquire, one of her Majesty's counsel then being;—and the others in the order above stated.

On the 19th of February, *James Manning* of Lincoln's Inn, *John Halcomb* and *William Fry Channel* of the Inner Temple, *William Shee* of Lincoln's Inn and of the Inner Temple, and *Digby Cayley Wrangham*, of the Inner Temple, Esquires, were admitted to the degree of serjeants at law, and gave rings with the following motto,—“*Honos nomenque manebunt.*”

On the 11th of April, the Reporter of these Cases received the appointment of Police Magistrate.

NEW CASES
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS.

Trinity Term,

IN THE
Third year of the reign of Victoria.—1840.

POGSON and Others against THOMAS and Others.—p. 337.

Testatrix had a mansion and lands thereunto belonging, situated in Kesgrave, Bealings, and Playford; also a meadow in Bealings: Held, that the land in Bealings and Playford did not pass under a devise of all testatrix's messuage and lands "situated at Kesgrave aforesaid," nor under a bequest of "all the residue of her estate and effects wheresoever and whatsoever."

By order of the Master of the Rolls, the following case was submitted for the opinion of this Court:

Emily Pogson, late of Kesgrave House, in the county of Suffolk, widow, deceased, was in her lifetime, and at the time of making her will hereinafter mentioned, and from thenceforth and at the time of her death, seised in fee-simple in possession of the lands and hereditaments hereinafter mentioned; and being so seised, duly made and published her last will and testament in writing, bearing date the 10th of July, 1835, and which was executed and attested by her so as to pass freehold estates of inheritance, whereby she gave and bequeathed unto and to the use of George Thomas, and to her son Graham Myers Pogson, (since deceased,) and to Edward Moor, John Henry Barton, and Thomas Clarkson, their heirs, executors, administrators, and assigns, according to the respective tenures thereof, all and singular her freehold messuage or tenement, lands and hereditaments, situate at Kesgrave aforesaid, and also all those her two sets of chambers in Gray's Inn, in the county of Middlesex, with the appurtenances thereto respectively belonging, upon trust, that they her trustees, or the survivors or survivor of them, or the heirs, executors, administrators, or assigns of such survivor, should, with all convenient speed after her decease, (unless they should deem it expedient to retain the said chambers longer in hand,) make sale and absolutely dispose of the said hereditaments and premises, with their appurtenances, as he or they should think fit. And

the testatrix declared that the moneys which should arise from such sale or sales should form part of her general personal estate, and should be paid, applied, and disposed of accordingly. And the testatrix gave and bequeathed unto her son, the said G. M. Pogson, his heirs, executors, administrators, and assigns, according to the tenure thereof, all and singular her messuage or tenement and lands of Monkstown or Myersville, in the county of Dublin, in Ireland, with the appurtenances thereto belonging, to and for his and their own absolute use and benefit. The testatrix then gave and bequeathed unto the said G. Thomas, G. M. Pogson, E. Moor, J. H. Barton, and T. Clarkson, their executors, administrators, and assigns, out of her general personal estate, the sum of 20,900*l.* upon certain trusts specified in the will; and after giving certain specific and pecuniary legacies, declared, that as to all the residue of her estate and effects wheresoever, and whatsoever, she gave and bequeathed the same unto the said G. Thomas, G. M. Pogson, E. Moor, J. H. Barton, and T. Clarkson, their executors, administrators, and assigns, in trust for all and every her sons who should be living at her decease, and who should have attained, or should afterwards live to attain the age of twenty-two years, in equal shares and proportions, if more than one; and in case there should be only one of her sons living at her decease who should then have attained, or should afterwards live to attain the age of twenty-two years, then in trust for such one of her said sons, his executors and administrators.

The said testatrix departed this life in the month of February, 1836, without having revoked or altered her will, and leaving the said G. M. Pogson, her eldest son and heir, her surviving.

The said G. M. Pogson departed this life shortly after the decease of the testatrix, leaving no issue born at the time of his death; but leaving Frances Ann Pogson, his wife, *enccinte*, and having made and published his last will and testament in writing, bearing date on or about the 9th of March, 1836, executed and attested as by law required for rendering valid devises of real property, whereby he gave and devised all his real estate whatsoever and wheresoever unto his wife F. A. Pogson, her heirs and assigns forever.

E. J. Pogson, F. W. M. Pogson, J. Pogson, J. A. Pogson, and W. W. Pogson, infants, by Edward Moor, their next friend, in the month of April, 1836, filed their original bill of complaint in the Court of Chancery against G. Thomas, E. Moor, J. H. Barton, T. Clarkson, G. T. Pogson, and F. A. Pogson, praying, amongst other things, that the will of the testatrix might be established, and the trusts thereof carried into execution, and that proper inquiries might be also directed to ascertain what real estates passed under and by virtue of the will of the testatrix to the trustees thereof upon the trusts for sale therein mentioned.

By a decree made by the Master of the Rolls, bearing date the 12th of December, 1836, it was declared that the will of the said Emily Pogson ought to be established; and it was, amongst other things, ordered that it should be referred to the master, to inquire and state what real estate the testatrix was possessed of and devised by her will to her trustees to be sold.

The master to whom the cause stood referred, by his report, bearing date the 31st of July, 1837, certified that the testatrix was, at the time of her death, possessed of the premises therein particularly mentioned; that is to say, all that capital messuage or mansion-house called Kes-

grave House, erected and built on the site, or partially on the site, of a capital messuage or mansion-house theretofore called or known by the name of Neakmear, with the barns, stables, out-houses, edifices, cottages, buildings, yards, orchards, lands, meadows, pastures, and feeding grounds thereto belonging, or therewith held and enjoyed, and thereafter particularly mentioned, with their and every of their appurtenances, as the same were situate, lying, and being in Kesgrave aforesaid, Little Bealings, and Playford, in the county of Suffolk, or in some other town or towns thereunto near adjoining, and were theretofore in the occupation of William Cooper, or his assigns, afterwards of George Thomas, Esq., grandfather of the defendant G. Thomas, and Thomas Scott, his tenant, since of George Thomas, the father of the defendant, G. Thomas, his tenants and assigns, and then of the said Thomas Pogson; and were formerly the estate and inheritance of George Thomas, the grandfather; and also all that part or parcel of freehold meadow, or pasture land, commonly called or known by the name of Lady Kemp's Meadow, or the Bell Meadow, or by whatever other name or names the same had been called or known, situate, lying, and being in Little Bealings, or in some adjoining parish or place in the county of Suffolk, containing by admeasurement 1 A. 2 R. 13 P. And the master,—after stating that it had been submitted to him by the plaintiffs that all the said premises were always considered and spoken of by the testatrix and treated by her as her property at Kesgrave, and were conveyed to Thomas Pogson, deceased, the husband of the testatrix, by one and the same conveyance; and that the plaintiffs were advised and submitted that all the said property was devised by the testatrix by her will, and was subject to the trusts of the will; and stating that, on the part of the defendant, F. A. Pogson, it had been submitted that the testatrix was, at the time of her death, entitled to certain hereditaments and premises situate at Kesgrave, and also to certain hereditaments and premises situate at a place called Little Bealings, and to certain hereditaments and premises situate at a place called Playford, all in the county of Suffolk; and that inasmuch as there were hereditaments and premises situate at Kesgrave sufficient to answer the devise, the said hereditaments and premises at Playford were not devised by the will of the testatrix to her trustees to be sold,—certified, that he was of opinion that the whole of the said premises therein mentioned passed under the said will.

The said Frances Ann Pogson, (who had since intermarried with and is now the wife of Willie Bever,) as devisee under the will of her late husband, filed an exception to the master's report, on the ground that he ought to have certified that the said hereditaments and premises at Little Bealings, and the hereditaments and premises at Playford, did not pass by the will of the testatrix.

The question for the opinion of the Court was, whether the lands in the parishes of Little Bealings and Playford—which are parishes distinct from but adjoining the parish of Kesgrave,—passed by the will of the said Emily Pogson, the testatrix.

The case was argued in Hilary term last, by
Coote, for the plaintiffs.

There are cases which decide that if a testator has lands in three parishes, and names only one, the lands in the other two do not pass; but here the testatrix, without specifying any parish, has devised her

lands at "*Kesgrave aforesaid*;" and some construction must be put on the word *aforesaid*:—it must mean her *estate* of *Kesgrave*. As she has not described her estate to be situate in the *parish* of *Kesgrave*, the following cases, which will be relied on for the defendant, do not apply. *Doe dem. Beach v. The Earl of Jersey*, 3 B. & C. 870, (10 E. C. L. R. 253;); *Doe dem. Clements v. Collins*, 2 T. R. 498; *Goodtitle dem. Radford v. Southern*, 1 M. & Selw. 299; *Guy v. Sharp*, 1 Mylne & Keen, 589; *Ongley v. Chambers*, 1 Bingh. 483, (8 E. C. L. R. 391;); 8 B. Moore, 665; *Miller v. Travers*, 8 Bingh. 244, (21 E. C. L. R. 288;); 1 M. & Scott, 342; and where the devise is *general*, evidence of parcel or no parcel is admissible, though not so where it is particular. But if the lands do not pass here under the expression *Kesgrave aforesaid*, they pass at all events under the general residuary devise: *Hogan v. Jackson*, Cowp. 304; *Bradford v. Belfield*, 2 Sim. 264. *Rudall*, for the defendants.

Where a devise is clear, extraneous evidence is not admissible to show the testator's meaning, 2 Starkie on Ev. 561; *Doe dem. Chichester v. Oxenden*, 3 Taunt. 147. Here the expression, "*situate at Kesgrave*," requires no explanation; and *Doe dem. Browne v. Greening*, 3 M. & Selw. 171; *Doe dem. Brown v. Brown*, 11 East, 441; and *Miller v. Travers*, are in point for the defendants.

As to the argument that the lands in Little Playford and Bealings passed by the residuary clause, the effect of a residuary clause is always a question of intention. Here the testatrix showed she knew how to distinguish between real and personal estate, having applied the word *heirs* and *executors* properly all through the will; and in the residuary clause the bequest is to the legatees, their executors, administrators, and assigns.

In *Shaw v. Bull*, 12 Mod. 592, TREVOR, C. J., said, "In construction of wills generally, the words 'my estate,' 'the residue of my estate,' or 'the overplus of my estate,' may well pass an inheritance, where the intent is apparent to pass it; but such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will and circumstances of the case. For if the words be indifferent to real and personal estate, or may be applied to personal estate alone, there the heir at law is not to be disinherited by the implication of such, or by any implication at all but what is a necessary one." In *Hogan v. Jackson*, Cowp. 304, the words of the residuary clause were "all effects, *real* and personal." In *Bradford v. Belfield*, 2 Sim. 264, the words were "testamentary estate," which includes real property; but in *Tilly v. Simpson*, 2 T. R. 659, note, Lord HARDWICK said, "The Court hath restrained the word *estate* to carry personal estate only, where it hath appeared that it was the intention of the testator it should be so understood: as where it hath stood coupled with particular descriptions of part of the personal estate, as a bequest of all my mortgages, household goods, and *estate*, in which the preceding words are not a full description of the personal estate." *Woollam v. Kenworthy*, 9 Ves. 137, is much like the present case; and *Doe dem. Spearling v. Buckner*, 6 T. R. 610, is decisive on the point in favour of the defendants. See also *Doe dem. Hurrell v. Hurrell*, 5 B. & Ald. 18 (7 E. C. L. R. 8;); *Doe dem. Hick v. Dring*, 2 M. & Selw. 448; *Newland v. Majoribanks*, 5 Taunt. 268, (1 E. C. L. R. 104;); and *Doe dem. Bunny v. Rout*, 7 Taunt. 79, (2 E. C. L. R. 32.)

Coote, in reply. In the cases cited for the defendants on the first point, there was an attempt to make out the devise by evidence *dehors* the will; but here the words "*Kesgrave aforesaid*," can only refer to the estate at Kesgrave House. As to the residuary clause, in the cases cited for the defendants, the reference to personal property was direct; not, as here, by way of inference only. The words *heirs* and *executors* must be taken to mean representatives, according to the nature of the estate; and the real question here as to the residuary clause is, whether or not the testatrix meant to die intestate as to any portion of her property.

The following certificate was sent in Trinity term:—

We have heard this case argued, in the absence of the lord chief justice upon the special commission at Monmouth, and of Mr. Justice COLTMAN, who was engaged at nisi prius: we have considered it; and we are of opinion that the lands in the parish of Little Bealings and Playford, in the pleadings in this cause mentioned, and which are stated to be parishes distinct from, but adjoining to the parish of Kesgrave, did not pass by the will of Emily Pogson, the testatrix therein mentioned.

J. B. BOSANQUET.

T. ERSKINE.

W. H. MAULE.

WHITTENBURY against LAW.—p. 345.

In an action against the public officer of a joint stock company, execution under 7 G. 4, c. 46, against a partner not named in the record, can be obtained only upon a *scire facias*.

THE plaintiff in this case having recovered against the defendant, who was sued as a public officer of the Imperial Bank of England, carrying on the business of banking under the provisions of the statute of 7 G. 4, c. 46, had obtained a rule calling on certain persons therein named to show cause why he should not have leave to enter a suggestion on the Roll that the several persons named in the rule were, before and at the date of the judgment, partners in the said company: and why execution should not be issued against them upon such judgment.

In Hilary term last,

Bompas, Serjt.; in support of the application, relied on *Bartlett v. Pentland*, 1 B. & Adol. 704, (20 E. C. L. R.,) where judgment having been obtained against a nominal defendant, a *ca. sa.* was sued out against a partner in the concern, but was set aside on the ground that the plaintiff ought to have applied for leave to enter a suggestion.

Stephen, Serjt., and *Jervis* showed cause. *Bartlett v. Pentland* only established in effect that execution cannot be had against one who is not named as a defendant, without some introduction of his name into the record. It was thrown out in argument that this might be done by way of suggestion; but that was not the point in the cause, and it is quite clear that a new party can only be introduced by means of a *scire facias*. Where a cause assumes a new aspect between the same parties, the new state of facts may be shown by way of suggestion; but where a new party is introduced, the proceeding is by *scire facias*.—*Penoyer v. Brace*, 1 Ld. Raym. 244, *Reg. v. Ford*, 2 Ld. Raym. 768,—which is in itself an execution; Lit. s. 505; and admits of traverse or demurrer by the party affected; whereas a suggestion, which is a mere surmise, is not

traversable,—*Vin. Abr., Traverse P.* pl. 8,—except in prohibition, by virtue of a particular statute. A party who is not in court cannot traverse. The point, however, has been expressly decided this term in the Queen's Bench (*Bosanquet v. Rainsford*, and in the Exchequer (*Cross v. Law*.)

Bompas, Serjt., and *Tomlinson*, in support of the rule. The object of the statute 7 G. 4, c. 46, s. 13, was to facilitate execution against the members of joint stock companies. Sect. 9 provides a nominal defendant on behalf of the partnership; so that it is the entire company which is sued and is responsible through each of its members; and there is no inconvenience or novelty in proceeding against the various members by way of suggestion. In an action against the hundred, two of the inhabitants only are sued; but execution may issue against any other inhabitant without a *sci. fa.* So, in actions against dock companies, where the clerk or treasurer is made the nominal defendant, execution may be had on the property of the company without any application to the Court. *Penoyer v. Brace* and *Reg. v. Ford* were cases of executors, whose position bears no analogy to that of a partner. As to the objection that the several members of the company are not in court, if they do not dispute that they are partners they are in court by their public officer; if they dispute that fact, they must be brought into court by *sci. fa.* There should, therefore, be a suggestion first, and then a *sci. fa.*, where the issue raised renders it necessary, as in the case of suggestion of further breaches under 8 & 9 W. 3, c. 1: 3 Chitty on Pleading, 1288; Tidd's Append. c. 43, s. 84. *Bartlett v. Pentland* is in point, and has not been overruled by the recent decisions.

Cur. adv. vult.

TINDAL, C. J.—after stating the facts, as *ante*, p. 345.—The application is founded upon the statute 7 G. 4, c. 46, s. 13, which provides “that execution upon any judgment in any action obtained against any public officer for the time being of any corporation or copartnership company carrying on the business of banking under the provisions of that act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership.”

The application is opposed, upon the ground that the proper course for making the persons in question parties liable to execution on the judgment is not to apply for leave to enter a suggestion, but to proceed against them by *scire facias*, which is the established form of proceeding to make any new person not a party to the judgment chargeable to the execution; *Penoyer v. Brace*, 1 *Ld. Raym.* 244, *Salk.* 319, *Queen v. Ford*, 2 *Ld. Raym.* 768, 2 *Saund.* 6 *in notis.*

In support of this application for leave to enter a suggestion, the case of *Bartlett v. Pentland*, 1 *B. & Adol.* 704, (20 *E. C. L. R.*), was relied on as being in point. In that case, judgment having been obtained against a nominal defendant, a writ of *capias ad satisfaciendum* was sued out against Sir A. B. King as a partner, without any leave having been applied for to enter a suggestion that he was a member of the company; and the Court of King's Bench held the execution to be irregular, and discharged Sir A. B. King out of custody. It was argued by the counsel for Sir A. B. King that the plaintiff ought to have applied for leave to enter a suggestion, to which he might, as it was said, have demurred, or have traversed the facts if they were untrue; and Lord TENTERDEN, on

delivering the judgment of the Court, adopted this argument. In that case, however, the substantial question was, whether, to prevent an incongruity upon the record, the character of new parties to be made liable to the execution must not, in some way, be made to appear thereon: it was no matter of consideration whether it ought to be made to appear by suggestion or by *scire facias*.

The latter point has since been fully considered, both in the Court of Queen's Bench, in the case of *Bosanquet v. Rainsford*, and in the Court of Exchequer, in the case of *Cross v. Law*, and in several other cases; and both Courts have concurred in the opinion that the proper course of proceeding, under these circumstances, is by *scire facias*, not by suggestion. In the opinion pronounced by those Courts we agree, and are therefore of opinion that the present rule must be discharged.

BROOK and Others, Assignees, &c., of JEROM, a Bankrupt, against MITCHELL and Others.—p. 349.

Trover does not lie for the assignees of a bankrupt against a creditor who sues out execution under a warrant of attorney not filed within twenty-one days, if the execution be completed before the act of bankruptcy: the remedy is by an action for money had and received, or by a special action on the statute 3 G. 4, c. 39.

THIS was an action of *trover*, brought by the assignees of one Jerom, a bankrupt, against Mitchell, a judgment creditor of the bankrupt, and the two other defendants, the sheriffs of Middlesex, for seizing and selling the goods of Jerom under a writ of *fi. fa.*

The plaintiffs declared upon a possession of the goods by Jerom before he became bankrupt, and a conversion by the defendants before such bankruptcy.

Upon demurrer to the plea of Mitchell, and to the plea of the two other defendants, the questions raised were, first, whether a warrant of attorney upon which the judgment was entered up, not having been filed within twenty-one days after its execution, and no judgment having been signed or execution issued within the same period, such warrant of attorney, and the judgment and execution thereon, were to be deemed fraudulent and void against the assignees under a commission which issued more than twenty-one days next after the execution of such warrant of attorney, by virtue of the provisions of the statute 3 G. 4, c. 39; and, secondly, whether the effect of that statute was altered by the provisions of the 2 & 3 Vict. c. 29.

In Michaelmas term last,

Kennedy, in support of the plea, contended that the defendants' execution did not fall within the provisions of the statute 3 G. 4, c. 39; and that, at all events, the plaintiffs could not sue in *trover*; to which point the decision of the Court was confined.

Trover does not lie unless the plaintiffs have a property in the goods which are the subject of the action, and a right to the possession of them: Com. Dig., *Trover*; *Addison v. Round*, 4 Adol. & Ell. 799. (31 E. C. L. R.); *Wilmshurst v. Bowker*, 5 New Cases, 541, (35 E. C. L. R.) But here the property in Jerom's goods was, before any act of bankruptcy, vested in the defendants under their execution; and the plaintiffs were never in possession till after the execution. If the plain-

tiffs sued on their own possession, it was too late, because the property was already in the defendants under their execution; if on the possession of Jerom, they failed, because his property in the goods ceased with the execution: he could never have sued the defendants in *trover*, and the plaintiffs, in deriving title from him, were equally concluded. Cases of fraudulent sale by a bankrupt had no application to the present, for a fraudulent sale was an act of bankruptcy, and did not divest the property of the bankrupt. The remedy for the plaintiffs, if any, was by a special action on the statute, or an action for money had and received: *Ward v. Clarke*, Moo. & Malk. 497, (22 E. C. L. R.,) *Missing v. Kemble*, 2 Campb. 115, *Hurst v. Orbell*, 3 Nev. & Per. 237.

Erle, contra. This is, in effect, an action on the statute: it does not rest on property so much as on fraud, or on that which, as against the assignees of a bankrupt, is treated by the statute as a fraudulent transaction; and in that light no property passed to the defendants under their execution, at least as against the bankrupt: if the Court should hold otherwise, the whole object of the statute would be defeated. In cases of actual fraud, such as *Rust v. Cooper*, Cowp. 629, and *Horwood v. Smith*, 2 T. R. 750, the transferee obtains no title; and by this statute the legislature proposed to consider an execution under a warrant of attorney a constructive fraud as against the assignees of a bankrupt.

Cur. adv. vult.

TINDAL, C. J. The questions raised upon a demurrer to the plea of Mitchell, and to the plea of the two other defendants, and which were principally argued before us, were, first, whether the warrant of attorney, upon which the judgment was entered up, not having been filed within twenty-one days after its execution, and no judgment having been signed or execution issued within the same period, such warrant of attorney, and the judgment and execution thereon, were to be deemed fraudulent and void against the assignees under a commission which issued more than twenty-one days next after the execution of such warrant of attorney, by virtue of the provisions of the statute 3 G. 4, c. 39; and, secondly, whether the effect of that statute was altered by the provisions of the 2 & 3 Vict. c. 29.

But an objection was raised in the course of the argument, on the part of the defendants, against the form of the action; and, upon consideration, we think that objection is valid, so as to render it unnecessary for us to give an opinion upon the other questions raised in the argument. That objection is, that under the facts appearing on the record the action of *trover* is not maintainable by the assignees; but that the only action maintainable, if indeed any be maintainable, is an action for money had and received to their use; and that at all events, and in any view of the case, an action of *trover* laying the conversion before the bankruptcy cannot be supported.

It appears, by express allegations on the record, that the judgment was entered up, the *fiery facias* issued and put into the hands of the sheriff, and the levy thereon actually made before the act of bankruptcy was committed.

To consider, therefore, in the first place, the objection to the form of the declaration in *trover*. "The possession is laid in the bankrupt, and the conversion by the defendants is alleged to have taken place before the bankruptcy; but the statute of G. 4 above referred to does not make the warrant of attorney and the judgment and execution void absolutely

as against all persons, but only as against the assignees under the subsequent commission. As against the bankrupt himself, therefore, the judgment was good, and the execution a valid execution, and the levy was no wrongful conversion; and so the transaction would remain a good and valid execution against him at all events up to the time of the bankruptcy. Upon no legal construction, therefore, as it appears to us, can the allegation be supported that there was any wrongful conversion before the bankruptcy.

But, in the next place, the action of *trover* itself is not maintainable by the plaintiffs; because they never had the possession, nor the right to the possession, of these goods in themselves as assignees. By no earlier statute is the relation carried back to a further point than to the act of bankruptcy; and there are no words in the statute in question which vest the property in the goods by relation in the assignees, either from the date of the warrant of attorney, or the judgment, or the execution.

Indeed, the statute itself appears to have provided for this difficulty of want of property in the assignees by pointing out the remedy to which the assignees are entitled; for by the second section, after enacting that the execution shall be deemed fraudulent and void against the assignees under such commission, it proceeds to enact, "that such assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt at large, all and every the moneys levied, or effects seized under and by virtue of such judgment and execution." Under which words of the statute they might, subject to all the other objections raised on the argument, have brought an action for money had and received, or perhaps have maintained a special action on the case, upon the words of the statute; but there is nothing to enable them to bring *trover*. Upon these two grounds, therefore, we think the present action not maintainable, and that there must be

Judgment for the defendants.

LUCKIN against SIMPSON.—p. 353.

The statute 2 & 3 Vict. c. 29, touching execution against bankrupts, is retrospective.

On the 16th of February 1839, a writ of *fi. fa.*, issued against the defendant at the suit of the plaintiff, was put into the hands of the sheriff: on the 23d of the same month a *fiat* was issued against the defendant.

Afterwards, under an order and certain rules of this Court, the money levied in pursuance of the *fi. fa.* was paid into Court, and an issue was directed, to try whether, at the time of awarding the *fiat* against the defendant, the different requisites existed which are necessary to support a commission of bankruptcy; in this issue the assignees were to be the plaintiffs, and Luckin the defendant. Pending these proceedings, and before the trial of the issue, the statute 2 & 3 Vict. c. 29, was passed, which enacts that all executions and attachments against the lands and tenements, or goods and chattels of a bankrupt, bona fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt, provided there was no notice of such act:

Whereupon, the plaintiff obtained a rule *nisi* for rescinding the rule under which the issue had been directed, and for paying over to the plaintiff the money paid into Court.

In Hilary term last,

Talfourd, Serjt., and *Shee*, who showed cause, contended that the statute was not retrospective. The eighty-second section of 6 G. 4, c. 16,—which enacted that all payments bona fide made or thereafter to be made, by any bankrupt, or to any bankrupt, before the date and issuing of the commission, without notice of any prior act of bankruptcy, should be deemed valid,—had been held retrospective; but that was because it provided for payments then made "*or hereafter*" to be made; *Churchill v. Crease*, 5 Bingh. 177, (15 E. C. L. R.,) *Terrington v. Hargreaves*, Ibid. 489; the Court relying expressly on the effect produced by the use of the words "*or hereafter*," which showed that the legislature had the past in view as well as the future: those words being omitted in the present statute, the legislature must be deemed, as in ordinary cases, to have had only the future in view.

Bompas, Serjt., and *Petersdorff*, in support of the rule. This act was passed to further the provisions of 6 G. 4, c. 16, s. 82, which are recited: it is true that in that recital the words, "*or hereafter to be made*," are omitted; but the legislature must be taken to have been cognisant of the two cases which have been referred to, and to have intended that the present enactment should be coextensive with the former, the two acts being *in pari materia*. This view of the act is supported by cases on similar provisions in other statutes: *Elston v. Braddick*, 2 Cr. & Mee. 435, *Cuming v. Welsford*, 6 Bingh. 502, (19 E. C. L. R.,) *Towler v. Chatterton*, Ibid. 258, *Ansell v. Ansell*, 3 Car. & P. 563, (14 E. C. L. R.)

Cur. adv. vult.

TINDAL, C. J. This question comes before the Court upon a rule to show cause why a certain order, and certain rules of the Court, by which an issue had been directed to be tried under the Interpleader Act, should not be discharged, and why a sum of money paid into Court should not be paid over to the plaintiff. The issue had been directed to try whether, at the time of awarding the *fiat* in bankruptcy against Simpson, the defendant in the original action, the different requisites existed which are necessary to support the commission, and in this issue the assignees of Simpson were directed to be the plaintiffs, and Luckin, the judgment-creditor, the defendant. It appears that the writ of *fi. fa.* of the plaintiff Luckin was put into the hands of the sheriff on the 16th of February, 1839, and the *fiat* was not issued until the 23d of the same month. But whilst these orders of the Court were pending, and before the trial of the issue, the statute was passed, 2 & 3 Vict. c. 29, entitled "An Act for the better protection of parties dealing with persons liable to the bankrupt laws," and received the royal assent upon the 19th of July, 1839. That statute enacted, amongst other things, "that all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bona fide executed or levied before the date and issuing of the *fiat*, should be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed," provided there was no notice of any prior act of bankruptcy.

The application, therefore, on the part of the plaintiff in the original action, the judgment-creditor, was, that the rules which had been obtained

for the trial of the issue might be altogether set aside, and the sum of 60*l*. 17*s*. produced by the sale of the goods, and paid into Court by the assignees, might be paid out to him, the plaintiff, on the alleged ground that the trial would now be altogether useless, the execution having been completed before the *fiat* was issued.

The whole question, therefore, between the parties resolves itself into the single point, whether the statute 2 & 3 Vict. is prospective only, so as to govern no executions or other transactions, except such as take place after the statute was passed into a law; or whether it was retrospective also, so as to give the law to transactions which had actually taken place before the passing of the statute, whenever they were brought before the Court for adjudication after the statute; and we are of opinion, looking at the words of the statute, that it gives the law to all cases that come for adjudication before the Court, where the execution was executed before the *fiat* in bankruptcy, whether the transaction brought before the Court took place before or after the passing of the statute.

The statute recites the eighty-second section of the 6 G. 4, c. 16, and in its mode of recital treats it as an enactment that relates to "all payments really and bona fide *made by* any bankrupt, or *to* any bankrupt, using only the word "made" in the past tense, notwithstanding the section itself contains the expression "really and bona fide made or thereafter to be made;" the very mode of recital, therefore, appearing to afford a legislative authority that the eighty-second section comprehends within its by-gone transactions; a point which had been already decided by the Courts of law;—see *Churchill v. Crease, Terrington v. Hargreaves*;—and the statute now under consideration continues to recite that it is expedient that further protection should be given to persons dealing with bankrupts before the issuing of any *fiat* against them; and then enacts in general terms, and without reference to any future time, that "all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt bona fide executed or levied before the date and issuing of the *fiat*, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed," under certain conditions which do not apply to this case.

The recent statute being made *in pari materia* with the former, and expressly in furtherance of the objects of the former, ought, as it appears to us, to receive the same construction as to its operation, and to be held to comprehend and govern the case before us.

We therefore think the order for the trial of the issue, which has now become useless, and the rules dependent thereon, should be discharged, and the produce of the sale of the goods paid out of Court to the judgment-creditor; but under the peculiar circumstances of the case, without any costs on either side.

Rule absolute.

DEVAUX and Another against STEELE.—p. 358.

A French law provides that "the vessel which shall have fished, either in the Pacific by doubling Cape Horn, or by passing through the Straits of Magellan, or to the south of Cape Horn, at 62 degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishery one-half at least of its burden, or if it can prove a navigation of sixteen months at least."

Held, that a vessel which had caught fish to the amount of half its burden in the Atlantic, then doubled Cape Horn and fished without success, and was lost within sixteen months after setting sail, had not complied with the conditions of the law, so as to be entitled to the bounty:

Held also that the practice of the French government to allow the bounty under such circumstances was a mere matter of expectation, and did not constitute a vested interest which could be the subject of insurance.

THIS was an action brought upon a policy of assurance which stated the insurance to be made to the amount of 800*l*. "on bounty allowed by the French government on the tonnage of the ship *Le Henri*, agreed to be valued at 800*l*." The declaration alleged that the said bounty would have been allowed by the French government upon the tonnage of the ship, if the said ship with the cargo on board had arrived in France; it then alleged a total loss by the perils of the sea. The fourth plea, upon which the whole of the question between the parties arose, alleged that the bounty which was the subject-matter of the insurance was a bounty allowed by the French government under a certain written law of France relating to the whale fishery, which being translated, is as follows:—"The vessel which shall have fished either in the Pacific Ocean, by doubling Cape Horn, or by passing through the Straits of Magellan, or to the south of Cape Horn at sixty-two degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back, in the produce of its fishery, one-half at least of its burden; or if it can prove a navigation of sixteen months at least:"—And the plea, after stating the course of the fishing voyage made by the ship, concluded with a traverse, "without this that the bounty in the policy mentioned would have been allowed by the said French government on the tonnage of the said ship, if the said ship with the said cargo on board had arrived in France, as in the declaration is alleged:" upon which traverse issue was joined.

By a special case, it appeared that the plaintiffs were insurance brokers in London, and were the agents of the firm of Messrs. Jacques François, *frères*, French merchants at Nantes, who at the time of effecting the policy, and at the time of the loss, were the owners of the French ship *Le Henri*. On the 28th of October, 1835, the defendant subscribed the policy of insurance for the sum of 400*l*.

The bounty referred to in the said policy, was the bounty allowed by the French government to encourage the whale fishery. On the subject of that bounty the following law of the 22d of April, 1832, and royal ordinance of the 26th April, 1833, were in force at the time of the insurance and loss, as set forth in the following translated extracts of such parts as have been deemed material to the present question.

"Article 1. The bounty granted to the fitting out of vessels for the whale fisheries, whether it be in the North Seas or in the Southern Ocean, shall be 70 francs per measurement ton, when the ships' companies shall without exception consist of Frenchmen.

"Article 2. The vessel which shall have been fishing, whether in the Pacific Ocean, either by doubling Cape Horn, or by passing through the Straits of Magellan, or to the southward of Cape Horn at sixty-two degrees of latitude at the least, shall obtain on her return a supplemental bounty, provided she shall bring home in the produce of her fishing one half at least of the burden; or it shall be proved that her navigation voyage has occupied sixteen months at the least.

"Article 3. The supplemental bounty shall be reduced one-half for such vessels as shall have fished to the eastward of the Cape of Good Hope, at forty-five degrees at least of longitude from the meridian of Paris, and at forty-eight to fifty degrees of south latitude.

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"Article 4. In order to have a right to the bounty, the crews of vessels which shall be composed partly of Frenchmen and partly of foreigners, shall consist of not more than one-third of foreigners, being officers, harpooners or masters of boats.

"Article 7. Royal ordinances shall determine the nature of the applications which shall be required of the owners previous to paying the outward bounty, and the proofs to be furnished showing that the voyage has been accomplished."

Decree of the King relative to the Bounties of the Whale Fishery :
26th of April, 1833.

"On returning from the fishery, every captain of a whaling vessel shall present himself before the Commissary of Marine of the port to which he returns, to declare the name and tonnage of the vessel, the port at which she was fitted out, the name of the owner, the date of his departure from France, the places where he effected his fishing, the duration and circumstances of his voyage, the date of his return, and the nature and nett weight of the produce of his fishing.

"The Commissary of Marine, after having interrogated and heard collectively and separately the men composing the crew, to assure himself by their declarations compared with the ship's journals, and the report made by the captain, whether the destination of the expedition has been fulfilled, shall state at the foot of the declaration of the captain, the result of such examination.

"Independently of this declaration, the captain shall make application to the administration of the customs for the survey and immediate verification of the description and weight of the produce of the fishery forming his cargo. The result of this operation shall be noted in a *procès verbal*, of which shall be transmitted direct to our Minister of Commerce and public works an authentic official copy, at the foot of which the administration of customs shall state whether the vessel has fulfilled the obligation of bringing home in the proceeds of her fishing at the least one-half of her burden. (Form No. 6.)

The liquidation of bounties paid by articles 1, 2, and 3, of the law before recited, shall be subject to approval by our minister of commerce and public works, on the transmission to him in due form of the undermentioned documents—that is to say—(among others)

"Form No. 5. Whale Fishery. Declaration of Return. Marine,
Port of —.

"'Before —, commissary of marine of this port, I the undersigned, —, captain of the French whaling vessel the —, measuring — tons, fitted out at —, the —, by —, and which sailed from France the —, declare that I came into this port the —, after having been engaged — months in the whale fishery in the — seas, and that I have brought home of my fishing—(state here the nature and weight in killogrammes of the different produce of the fishery)—composing my cargo, and proceeding solely from the fishing made by the said vessel;—(report further the principal circumstances of the voyage.) In faith of which I have signed the present declaration, and produce, in support thereof, my ship's journal.'

' At — the —.

" We — , commissary of marine at the port of —, having interrogated and heard the men composing the crew of the ship —, and having compared their declarations with that of the captain, and with his ship's journal, consider that the said expedition has fulfilled all the conditions stipulated in the recognisance of the owner, conformable to the law of the 22d of April, 1832, and the royal decree of the 26th of April, 1833.

' Form 6.—Whale Fishery. *Procès Verbal* of Verification of Cargo.

" We, the undersigned — of the customs of this port, upon the demand of M. —, captain of the whaling vessel the —, measuring — tons, fitted out at —, by —, which sailed from France the —, and came into this port the —, proceeded to the examination and verification of the description and weights of the produce of the fishery forming the cargo, and have ascertained that it is composed of —, which we consider forms more than half of her loading; for which reason we are of opinion that the said vessel has fulfilled the obligations imposed in this respect by article 2, of the law of the 22d of April, 1832, in the case of a voyage of less than sixteen months.' "

The said ship, manned with French seamen, sailed from Nantes, a port in France, on the 28th of February, 1835, for the South Sea whale fishery, all the conditions required by the law and ordinance above set out to be fulfilled previously to sailing, having been fulfilled before and at the time of setting sail.

The vessel fished, and caught twenty-one whales between the beginning of June and end of October, 1835. Six of those whales were caught near the island of Tristan de Cunha, on the east coast of South America, and the rest off Great-fish Bay, and other parts along the coast of Africa. The oil obtained from those twenty-one whales was stowed, and formed more than half the cargo.

At the end of October, or beginning of November, 1835, the ship doubled Cape Horn, and went into the Pacific Ocean, with the intention of catching fish in the seas beyond Cape Horn, and so completing her voyage. No fish were taken after the vessel doubled Cape Horn, (although a great number of whales were seen,) because the ship was prevented by the continued bad weather.

On the 24th December, 1835, the ship was wrecked off the isle of Lemas, and wholly lost, together with the said proportion of her cargo which she had obtained.

In answer to an application made on behalf of the plaintiffs, Monsieur Senac, the chief clerk in the office of the minister of commerce, at Paris, for the liquidation of bounties, stated that "The law of the 22d of April, 1832, article 2, grants a bounty upon return to vessels which, having fished in the Pacific Ocean, shall give proofs of sixteen months' navigation, or that they have half their burden in the produce of their fishery. The government does not make any inquiry into the matter to ascertain whether the produce has been or has not been fished beyond or on this side of Cape Horn: the right to the bounty is acquired by either the one or the other of the two alternative conditions prescribed by the law. This is the rule in the business."

[Here followed a case stated on the part of the plaintiffs, for the opinion of Messrs. S. Dupin and Delangle, deans of the order of advocates of the Cour Royale, at Paris; and a case stated on the part of the defendant for the opinion of Messrs. Blanchet Delagrangé and Odillon Barrot, advocates of the same court.

The opinions were conflicting, and did not influence the decision of this Court.]

It was agreed that the Court should have the same power as the jury would have had of drawing any inference of fact from the circumstances and documents above set forth.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover upon all or any of the issues joined in the pleadings. And if the Court should be opinion that the plaintiffs were entitled to recover, then the judgment was to be entered for the plaintiffs for the sum of 400*l.*; but if the Court should be of a contrary opinion, then a *nolle prosequi* was to be entered, or otherwise, as the Court might think fit.

In Trinity term, 1839,

Wilde, Serjeant, for the plaintiffs, argued, first, that the conditions of the French law had been sufficiently complied with to entitle the ship-owner to claim the bounty. Provided the ship went beyond Cape Horn, and brought back in the produce of its fishery one-half its burden, it was immaterial whether the fish were caught on this or the other side of the Horn. The manifest object of the French law was to encourage navigation in the Pacific and extreme southern latitudes, and that object was attained by the ship's doubling Cape Horn and *bonâ fide* proceeding to fish, though the fishing itself was not attended with success in that quarter: But,

Secondly,—even if the conditions of the law had not been strictly fulfilled, it appeared from the statement of M. Senac to be the constant practice of the French government to allow the bounty to ships which performed the voyage in question under circumstances such as the present: and that practice of the French government gave an expectation of profit sufficiently certain to be the subject of an insurable interest: it was something more definite than a mere probability; for the course of government might be relied on as uniform, and bad faith was not to be presumed. Therefore in *Le Cras v. Hughes*, Park, Ins. 406, it was held that the plaintiff had an insurable interest in the expectation of a grant, which the crown, though not compellable to make, was always in the habit of making to parties circumstanced as he was. So in *Grant v. Parkinson*, Park, Ins. 402, the expectation of the profits to arise on a cargo of molasses belonging to the plaintiff, who had a contract with government to supply the army with spruce beer, was held to be an insurable interest, *Flint v. Le Mesurier*, Park, Ins. 403; *Sterling v. Vaughan*, 11 East, 619; *Boehm v. Bell*, 8 T. R. 154; *Barclay v. Cousins*, 2 East, 544; *Henrickson v. Margetson*, 2 East, 549, note; and *King v. Glover*, 2 N. R. 206, all show that the expectation of profits may be the subject of insurance; and though Lord ELDON, in *Lucena v. Crauford*, 2 N. R. 269; and Lord ELLENBOROUGH, in *Routh v. Thompson*, 11 East, 428, were unwilling to extend the principle laid down in *Le Cras v. Hughes*; yet, that case, which was in point for the plaintiffs, had never been overruled; and in *Hodgson v. Glover*, 6 East, 316; and *Crawford v.*

Hunter, 8 T. R. 13, which might seem to bear the other way, the interest was not so certain as in the present case.

R. V. Richards, for the defendant, contended that the plaintiffs had not fulfilled the conditions of the French law. The object of that law was to encourage the fishery in distant and dangerous seas; and that object would be frustrated, if a vessel, after procuring her cargo in nearer and easier latitudes, were to be deemed entitled to the bounty by merely doubling the Cape, and then returning home.

Then, the practice of the French government in granting the bounty, —assuming it to exist as alleged by the plaintiffs, of which there was no sufficient proof,—was not sufficiently certain, to form the subject of an insurable interest. The expectation of profits might, indeed, be the object of insurance, because they are the object and general result of mercantile enterprise; but a grant from the crown, which might be given or withheld at pleasure, could not be a subject in which the assured had any vested interest. Therefore, in *Routh v. Thompson*, an allegation that the interest in a naval prize was in the captors, was held to be unsupported in proof, as they had no insurable interest, for they could claim nothing of *right*, but only *ex gratiâ* of the crown, notwithstanding the usage under which such interest was constantly transferred to the captors; and Lord ELLENBOROUGH said, “The case expressly states, that the policy was effected on account of the captors; and that statement precludes us from considering it as effected on account of the crown. Had there been no such specific statement, it might have been open to us to consider whether the policy were not referable to the interest of the crown: but after a distinct statement that it was effected (not on behalf of the crown, but) on account of the captors, it must be referred wholly to them, and the plaintiffs must recover or fail, according as they have or have not a right to aver an interest in themselves: this brings us to the question, whether they had an insurable interest? Their right in this respect has been put upon two grounds; first, that they had a well-grounded expectation, warranted by the practice of the crown in similar cases, that the ship and freight, had there been no loss, would have been granted to them; and, secondly, that they had the lawful possession, and were liable either to the crown or to the foreign owner, for the safe custody of the vessel: and that, on either of these grounds, they were warranted in insuring on their own account. As to the first, it is material to see in what situation the captors stood: it is clear they had no vested right; they could demand nothing of the crown. Had the crown made the grant in their favour, it would have been altogether *ex gratiâ*, a mere boon and gift.” In *Le Cras v. Hughes*, Lord MANSFIELD said, “The crown always makes the grant, and *there is no instance to the contrary*.” In the present case the experience of *M. Senac* alone could not go to that extent; but *Le Cras v. Hughes* was, in effect, overruled by *Routh v. Thompson*.

Wilde, in reply. In *Routh v. Thompson*, there was no *scintilla* of interest, while, in the present case, the evidence of *M. Senac* shows that the government would certainly have allowed the bounty.

Cur. adv. vult.

TINDAL, C. J. This was an action brought upon a policy of assurance, which stated the insurance to be made to the amount of 800*l.* “on bounty allowed by the French government on the tonnage of the

ship *Le Henri*, agreed to be valued at 800*l*." The declaration alleged, that the said bounty would have been allowed by the French government upon the tonnage of the ship, if the said ship, with the cargo on board, had arrived in France, and then stated a total loss by the perils of the sea. The fourth plea, upon which the whole of the question between the parties may be considered to arise, alleges that the bounty, which is the subject-matter of the insurance, was a bounty allowed by the French government under a certain written law of France, relating to the whale fishery, which, being translated, is as follows:—The vessel which shall have fished either in the Pacific Ocean, by doubling Cape Horn, or by passing through the Straits of Magellan, or to the South of Cape Horn, at 62 degrees of latitude at the least, shall obtain, on its return, a supplemental bounty, if it brings back, in the produce of its fishery, one-half at least of its burden, or if it can prove a navigation of sixteen months at least." And the plea, after stating the course of the fishing voyage made by the ship, concludes with a traverse, "without this, that the bounty in the policy mentioned would have been allowed by the said French government on the tonnage of the said ship, if the said ship, with the said cargo on board, had arrived in France; as in the declaration is alleged," upon which traverse issue is joined.

On the part of the plaintiff two points have been made and argued before us. First, that upon the proper construction of the French law, the bounty would have been payable by the government on the arrival of the ship under the facts stated in the case; and, secondly, that if not payable upon the strict construction of the law, still, according to the usual course observed by the department of the French government to which the administration of this law is committed, the bounty would have been, in fact, allowed by the French government, and, consequently, that the plaintiffs had an insurable interest in the bounty, so as to satisfy the terms of the policy.

As the ship had not performed a navigation of sixteen months, the first question appears to be reduced to this single point,—Whether, in a case where the ship had got on board in the produce of its fishery more than half of its burden before she had doubled Cape Horn, and had afterwards gone into the Pacific Ocean, the terms of the law are satisfied simply by her doubling Cape Horn, and going into the Pacific Ocean, with the intention of catching fish there, and attempting to do so, but taking none; that is, in fewer words, whether it was necessary that some part, at least, of the produce of her fishing should be taken in the fishing latitudes pointed out by the law. And we think, upon the state of facts above given, that the terms of the law are not satisfied, and that the bounty would not have become payable if the ship had arrived with her said cargo, under the proper construction of the said law.

Looking at article 2 of the law,—and we cannot think that any of the documents referred to in the case throw any material light upon any side of the question,—the plain natural construction of the words used in it appears to us to require that at least some part of the produce of her fishing which the ship brings home,—and the facts of this case do not require us to decide how large a proportion,—must be obtained within the fishing limits described in the law, in order to entitle her to the bounty. The language of the law is,—“the vessel which shall have

been fishing within certain prescribed limits, and which shall bring home in the produce of her fishery :”—which latter words, if there is nothing besides them to give them a different meaning, naturally refer to the fishing which has just before been mentioned, that is, a fishing within the prescribed limits ; not to a fishing anterior to the time when the ship had reached those limits, or subsequent to the time when she had left them. And not only the language of the law, but the object and intention of the law-makers, seems to demand this construction. The object of the government must have been to form a school for good seamanship, by granting a premium to the owners of vessels engaged in the fishing in dangerous and tempestuous seas, and that object was expected to be accomplished either by the ship's obtaining a certain produce by her fishery, or in case of the want of success in fishing, then by a navigation continuing for a certain duration of time. The latter condition is sufficiently intelligible of itself ; but the former, as it appears to us, is more likely to effectuate the object intended by the law, if held to imply that the produce of the fishery, either in the whole or at least in part, must be obtained within the prescribed limits, rather than out of them. For, in the first place, the seas in which the greatest dexterity and manhood are required are well known to be comprised within those latitudes ; and, in the next place, it would defeat instead of furthering the object of the government, if a vessel could entitle itself to the bounty by obtaining the necessary quantity of produce from fishing in calmer seas, and after doubling Cape Horn, and fishing ineffectually in the Pacific for some time, however short, by returning back again to France without having procured any portion of her cargo within the limits mentioned in the law. As well, therefore, upon the words of the law as upon the manifest intention of it, we think the bounty would not have been claimable, under the circumstances of this case, as a matter of right.

But, admitting the bounty not to be payable as a matter of right, under the strict interpretation of the law, it is argued on the part of the plaintiffs, in the second place, that they had such a certainty of receiving it, upon the return of the ship with her produce, according to the course and practice of the government of France in administering the bounty, that they had an insurable interest therein : on which very point a separate issue was raised by the second plea. And this argument is founded upon the cases of *Grant v. Parkinson*, *Le Cras v. Hughes*, and other cases of the same class, which were cited and relied on at the bar. It is undoubtedly true that, in the case of *Le Cras v. Hughes*, the Court expressed a decided opinion that the expectation of future benefit, founded on the contingency of a future grant from the crown, but warranted by universal practice, did amount to an insurable interest. But after the observations made on that case by Lord ELDON, in giving judgment in the House of Lords in *Lucena v. Crauford and Others*, 11 East, 321, and by Lord ELLENBOROUGH in *Routh v. Thompson*, 11 East, 434, the doctrine laid down in *Le Cras v. Hughes*, if still to be treated as a binding authority, must be considered incapable of being extended, and as confined to cases falling strictly within the same circumstances. “ If the *Omoa* case,” says Lord ELDON, “ was decided upon the expectation of a grant from the crown, I never can give my assent to that doctrine. That expectation, though founded upon the highest probability, was not interest ; and it was

equally not interest, whatever might have been the chances in favour of the expectation."

The case, however, of *Le Cras v. Hughes* did, in its circumstances, show an expectation approaching much nearer to certain interest than the present. In that case it was stated by Lord MANSFIELD, "The crown *always* makes the grant, and there is no instance to the contrary." In the case before us, the bounty referred to in the policy is stated both in the special case itself, and also upon the fourth plea, to be the bounty allowed by the French government under a written law, which is set out in the case in the fourth plea. When, therefore, it is once determined that the bounty which is so created by the written law, and by nothing else, is not, under the facts stated in the case, allowable by the legal construction of that law, it would require the most cogent and indubitable evidence of the actual and uniform allowance of the bounty under that state of facts to induce us to hold it a bounty allowed by the government. Looking, however, at the evidence, the certificate of Mr. Senac, the chief clerk in the office of the minister of commerce at Paris for the liquidation of bounties, which is the only evidence appealed to on this point, is very short of direct and satisfactory evidence of that fact. It is in its terms negative only. The certificate states, "that the government does not make inquiry into the matter, to ascertain whether the produce has been or has not been fished beyond or on this side of Cape Horn." How long the practice of making no such inquiry has existed, —whether the case has ever occurred of the allowance having been made where the produce was, in fact, fished on this side of the Cape, —whether, in cases where that fact was known, the bounty has nevertheless been actually granted; or, if that fact were suspected, whether the inquiry would not be made, —all these are points on which the certificate is altogether silent. It would be impossible, as it appears to us, to hold this to amount to proof that, from the time of granting the bounty, there has been a uniform course of practice, without any exception, of allowing the bounty under the circumstances stated in the case; and unless such evidence is produced, the case does not fall within the rule laid down in *Le Cras v. Hughes*, and the plaintiffs cannot be held to have taken an insurable interest in the bounty.

We therefore think, notwithstanding both the points which have been taken on the part of the plaintiffs, that a *nolle prosequi* must be entered.
Judgment for defendant.

MORRELL against MARTIN.—p. 373.

1. A demand of a highway rate by one only of two surveyors is a valid demand.
2. An inhabitant of the parish for which such rate is made, is a competent witness in support of the rate.

THIS was an action of replevin, to which the defendant, in the first place, pleaded *non cepit*; and, secondly, made cognisance, setting out, in substance, that one Thomas Ayerst and one Thomas Mercer Durant were surveyors of the parish of Hawkhurst, acting in pursuance of the statute 5 & 6 W. 4, c. 50, and that the plaintiff was the occupier of certain property, and liable in respect thereof to be rated to the rate

after mentioned; that whilst the said Ayerst and Durrant were and continued to be such surveyors as aforesaid, by a certain rate and assessment then made and signed by the said Ayerst and Durrant as such surveyors as aforesaid, for the repair of the highways within the parish of Hawkhurst, the sum of 51*l.* 0*s.* 5*d.* was rated and assessed upon the said property of the plaintiff, and on the plaintiff in respect thereof; that the said rate was the first rate for the repair of the highways in the year for which the said Ayerst and Durrant were such surveyors as aforesaid; that afterwards, and before the said sum of money so rated on the property of the plaintiff had been demanded of the plaintiff as after mentioned, and whilst the said Ayerst and Durrant were such surveyors as aforesaid, the said rate was duly allowed by two justices of the division, one being of the quorum; that the said Ayerst and Durrant so being such surveyors as aforesaid, on the Sunday next after the allowance, caused public notice to be given of the rate and allowance; that although payment of the said sum of 51*l.* 0*s.* 5*d.* was afterwards, and before the granting of the summons after mentioned, demanded of the plaintiff, to wit *by the said Durrant, so being such surveyor* of the highways as aforesaid, the plaintiff wholly refused and neglected to pay the same; that the said Durrant, so being such surveyor as aforesaid, made complaint and gave information on oath thereof to a justice, who issued a summons to the plaintiff to show cause before the justices who should be present at the George Inn, in Cranbrook, on the 2d of February then next, why the said sum should not be levied on his goods and chattels, which summons was duly served on the plaintiff, who did not appear at the time and place appointed, but the said Durrant was present; that the said Durrant and one Thomas Perrigol, were examined on oath before the justices there; and that thereupon the justices made their warrant in writing, directed to the surveyors of the highways of the parish of Hawkhurst, and to the constable of the said parish, whereby, after reciting, amongst other things, that it appeared to the justices as well upon the oath of Thomas Mercer Durrant, one of the said surveyors of the highways of the said parish, as otherwise, that the said sum had been lawfully demanded by the said Durrant, but that the plaintiff had refused to pay the same, the justices required the persons to whom the warrant was directed to make distress of the plaintiff's goods, and if the said sum of money was not paid in five days, to sell. The cognisance further stated that the defendant was constable of the parish of Hawkhurst; that the warrant was delivered to Ayerst and Durrant as such surveyors as aforesaid, and to the defendant as such constable as aforesaid, to be executed; that the defendant as such constable was by the said Ayerst and Durrant, being such surveyors as aforesaid, required to aid and assist in the execution of the said warrant; and so the defendant as such constable, acting in aid and assistance of the said Ayerst and Durrant as such surveyors as aforesaid, well acknowledged the taking, &c.

To this cognisance the plaintiff replied *de injuriâ*, &c.

At the trial before PATERSON, J., the defendant, in support of this cognisance, called Durrant the surveyor, who was objected to as a rated inhabitant: the objection, however, was overruled, the learned judge holding that the witness was made competent by the statute 54 G. 3, c. 170, s. 9.

It was then objected that the two surveyors, Ayerst and Durrant,

filled but one office; and that the demand of the rate should have been made by both, whereas it had been made by one only.

A verdict was taken for the defendant, with leave for the plaintiff to move to set it aside, if the Court should decide in his favour on either of the above or of several other objections which were taken at the trial.

A rule nisi having been obtained accordingly,

Ogle showed cause at the sittings, in banc, Trinity Vacation, 1839.

And *Platt*, and *Channell*, were heard in support of the rule.

The Court pronounced an opinion on two only of the various points which were discussed; and the arguments urged on each side are so fully stated in the judgment as to render superfluous a statement of them here.

Cur. adv. vult.

TINDAL, C. J., (after stating the pleadings as *antè*, p. 415.) Upon the trial of the action before my brother PATTESON, after the taking had been proved, various objections were urged on the part of the defendant against the plaintiff's right to recover, which objections were overruled by the learned judge; but leave was reserved to the defendant to have a nonsuit entered, if the Court should consider the objections, or any of them, to be valid. But the opinion which we have formed on the other points of the case has rendered the consideration of these objections unnecessary.

The defendant then proceeded to support his cognisance, and called the surveyor Durrant, as his witness for that purpose. This witness was objected to by the plaintiff as incompetent: it was urged that he had an interest in the case which disqualified him by the general rules of law; and that the 100th section of the 5 & 6 W. 4, c. 50, did not apply to such an action as the present. The interest which was alleged to disqualify Durrant was that he had made himself liable to the attorney for the costs of the action. This ground of objection was removed by a release. (*a*)

It was then objected that he was an incompetent witness, as being an inhabitant of the parish, and so interested to increase the fund for the repair of the highways. This objection, the learned judge thought, was removed by the statute 54 G. 3, c. 170, s. 9; and in this opinion we agree. By that section, no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, &c., or wholly or in part supported thereby, or executing or holding any office thereof or therein, shall before any court be deemed and taken to be by reason thereof an incompetent witness for or against such district, parish, &c., in any matter relating to such rates or cesses. Although, therefore, in the cases of *Oxenden v. Palmer*, 2 B. & Adol. 236, (22 E. C. L. R. 64,) and *Rex v. Inhabitants of Bishop Auckland*, 1 Adol. & Ell. 744, (28 E. C. L. R. 197,) it was held that the statute did not apply, except to cases which do properly and strictly relate to rates or cesses of the parish; yet it appears to us that the present case is one which does strictly and properly relate to the rates of the parish: because, if the defendant fails in his cognisance, it will have the effect of entitling the plaintiff to a return of the goods seized in satisfaction of the highway

(*a*) In the argument in Court, something was said about his having a salary out of the poor rates; but in the judge's note it did not appear that he had a salary, or that the objection of his having a salary was raised. If the fact had been strictly proved, it might give rise to a different objection under the 9th section, viz. that only one salaried surveyor can be appointed.

rate; and, therefore, the present is a case strictly falling within the provisions of the statute.

But it was further objected that the two surveyors in this case constituted but one officer, and the case of *Bell v. Nixon*, 2 Moore & S. 534; 9 Bingh. 303, (23 E. C. L. R. 314,) was cited; and it was argued that in such cases both ought to join in doing all official acts, and in particular that the demand in this case, being made by one only, was insufficient. But we think the case of *Bell v. Nixon* has no application to the present case, unless the plaintiff can succeed in showing that the several persons appointed to execute the office of surveyor constitute but one officer; and we think, on the proper construction of the statutes, he has failed to establish that point. By the former statute, 13 G. 3, c. 78, the constables, &c. are to make out a list of ten persons in the parish, qualified as is directed in the act; and if there are not ten persons qualified, they are to insert in the said list the names of so many persons as are qualified as required by the act, together with the names of so many of the most sufficient and able inhabitants not so qualified as shall make up the number ten, if so many can be found, if not, so many as shall be there resident, "to serve the office of surveyor of the highways;" and the justices from the said list "shall appoint one, two, or more of such persons as aforesaid, if he or they shall, in the opinions of such justices, be qualified for the office of surveyor, if not, one, two, or more of the other substantial inhabitants or occupiers of lands, &c. within such parish, &c. living within three miles, and within the said county, fit and proper to serve the office of surveyor of the highways for the said parish, &c. for the year ensuing, and shall take upon him and duly execute the office aforesaid." It appears, therefore, by the express words of this act, that the several persons appointed "to serve the office of surveyor," did not constitute one officer, but *every person* so appointed was a surveyor; and there is no more inconvenience in having several surveyors than in having several churchwardens, or several overseers of the poor.

This act of 13 G. 3, c. 78, was repealed, along with many other statutes relating to highways, but the act 5 & 6 W. 4, c. 76, entitled "An Act to consolidate and amend the laws relating to Highways in England;" and by the 6th section of that act, the inhabitants of every parish, at their first meeting in vestry for the nomination of overseers, "shall proceed to the election of one or more persons to serve the office of surveyor in the said parish, for the year then next ensuing." Now, it does not appear to us to be at all a strained construction of these words to understand by them that each of the persons nominated is to serve the office of surveyor. We see no reason for thinking that the statute 5 & 6 W. 4, c. 50, was intended to make any alteration, in this respect, of the statute 13 G. 3, c. 78, in which the same words, "to serve the office of surveyor," are to be found, but coupled with the distinct provision before alluded to, that every person so nominated shall be surveyor, and shall execute the office aforesaid.

In confirmation of this view, it is to be observed that in several sections of the act 5 & 6 W. 4, it is implied that there may be more than one surveyor in a parish. By sect. 10, it is provided that the surveyor or surveyors shall deliver to the justices a statement in writing of the name and residence of the persons appointed to succeed him or them as surveyor or surveyors; and by the 11th section it is provided that in case

it shall appear to the justices on oath "that the inhabitants of any parish have neglected to nominate and elect a surveyor or surveyors in manner and for the purposes aforesaid," the justices are authorized to appoint a surveyor till the annual meeting then next ensuing for the nomination of overseers, or for the election of surveyors as aforesaid.

It is true that many clauses of the act use the term "the surveyor of the parish," without adding the words "or surveyors;" but no inference can be drawn from this omission, because, in section 5, (the interpretation clause,) it is provided that wherever in referring to any person the word importing the singular number only is used, the same shall be understood to include several persons or parties as well as one person or party, unless there be something in the subject or context repugnant to such a construction.

On these grounds, therefore, we are of opinion that each of the parties appointed is a surveyor of the parish. The rate, then, having been made by both surveyors, is open to no objection; and we think, after the rate has been well made, that as a payment to one of the surveyors would undoubtedly be a good payment to discharge the party, so a demand by one of the surveyors is sufficient, the power of demanding payment being in the nature of a mere ministerial act, flowing as a natural result from the making of the rate and the power of receiving it. In the case of the poor-rate, though the major part of the churchwardens and overseers must make the rate, yet, for the purpose of levying it, a demand by one of the overseers and a complaint by one to the justices is sufficient; it being provided by 43 Eliz. c. 2, s. 4, that it shall be lawful for the churchwardens and overseers, or *any of them*, by warrant, &c., to levy the said sums. And it appears to us that the case is not different with respect to the surveyors of the highways; it being provided by the 34th section of the 5 & 6 W. 4, c. 50, that for levying and recovering the rate the surveyor shall have the same powers, remedies, and privileges as the overseers of the poor for the recovery of the poor-rate.

We think, therefore, that as well on grounds of reason as of the statutory enactments on the subject, the rate was well made and levied, and that the defendant is entitled to the judgment of the Court.

Judgment for defendant.

BECKETT against WOOD.—p. 380.

In an action for wages brought by the secretary of an intended joint-stock company against one of the provisional committee, another member of the committee was held a competent witness for the defendant after a release from him.

THIS was an action brought by the plaintiff to recover wages alleged to be due to him as secretary, against the defendant as one of the provisional committee of a company intended to be established under the name of the Middlesex County Bank. On the part of the defendant, one Mr. Nicholson was called, for the purpose of proving that the engagement was entered into and the work performed by the plaintiff, not upon a contract for a money payment, but upon an agreement that the plaintiff should have a permanent employment under the company

when the same should be established. Upon the examination of this witness upon the *voir dire*, it appeared that he also was one of the provisional committee; and it was thereupon contended that he was liable as a co-contractor, or copartner, with the defendant, to contribute to the damages and costs, and therefore inadmissible as a witness. Whereupon the defendant executed a release to the witness; but the objection was then renewed, that inasmuch as many other persons were joint contractors with the defendant and the witness, the release of the defendant alone would not inure to release the witness from any claim to future contribution on the part of such other joint contractors: and the authority of two cases at Nisi Prius, *Cheyne v. Koops*, 4 Esp. 112; and *Simons v. Smith*, Ry. & Moo. 29, (21 E. C. L. R. 374,) was urged in support of the objection, which objection, on the authority of those cases, was allowed, and the witness rejected.

Goulburn, Serjt.,—who moved for a new trial on account of the rejection of this witness, cited *Wilson v. Hirst*, 4 B. & Adol. 760, (24 E. C. L. R. 156;) and *Jones v. Pritchard*, 2 Mees. & Wels. 199, where, in an action for work done to a vessel against one part-owner, another part-owner was held to be a competent witness for the defendant after a release; which cases, he contended, had, in effect, overruled *Cheyne v. Koops* and *Simons v. Smith*.

Wilde, Serjt., and *Barstow*, who showed cause in Michaelmas term, 1839, relied on the two last-mentioned cases; and contended that Nicholson, notwithstanding the release by the defendant, would, if the plaintiff succeeded, be liable to an action at the suit of the other partners or co-contractors for his proportion of the costs and damages recovered by the plaintiff, and therefore was immediately interested in the result of the action. Lord ALVANLEY said, in *Cheyne v. Koops*, that if the defendant were dead or insolvent, the plaintiff might file a bill in equity to compel all the co-contractors to contribute. In *Wilson v. Hirst* the witness was released by all the partners, and in *Jones v. Pritchard* he came to prove that he was solely liable.

Goulburn and *Cowling*, in support of the rule. Nicholson and the defendant were co-contractors only, and not partners, for the intended company had not been formed: *Fox v. Clifton*, 6 Bingh. 776, (19 E. C. L. R. 233.) But even if they were partners, *Wilson v. Hirst* is in point for the admissibility of the witness. The other partners could have had no claim for contribution against Nicholson as to the expense of this action after his release by the defendant; *Duke v. Pownall*, Moo. & Malk. 430, (22 E. C. L. R. 350.) In *Lechmere v. Fletcher*, 1 Cr. & Mee. 625, BAXLEY, B., said, "If, on a joint contract, you have sued one, and entered judgment against him, there might be an invincible obstacle; because, upon a new action against another of the parties to the contract, the defendant would have a right to plead that he made no promise, except with the other defendant, against whom the judgment was entered, and he could not be joined. Therefore, though we have met with no case which establishes the position, we are inclined to think that, in the case of a joint debt, a judgment against one joint contractor would be a bar to an action against another." And the possibility of the bankruptcy or insolvency of the defendant did not constitute a direct interest in the result of the verdict; *Clark v. Lucas*, Ry. & Moo. 32. In *Young v. Bairner*, 1 Esp. 103, where a witness had been rejected by

LORD KENYON under circumstances similar to the present, a new trial was granted without argument.

Cur. adv. vult.

TINDAL, C. J., (after stating the facts as *ante*, p. 418.) The liability of the witness in the existing state of the proceedings could, at most, have been that of a co-contractor only, not of a copartner; for as no joint fund was raised, no copartnership at that time existed. We think, however, as well upon consideration of the ground of the objection itself, as of the authority of the cases which have been determined on this point, that the objection ought not to prevail.

Upon the evidence in the cause, as we have already observed, the defendant and the witness were not partners, but co-contractors only; and after the release given by the defendant to the witness, we think the defendant could not himself have set up against any other joint contractor a demand for that share of contribution which, but for his own release, he might have derived from the witness, and which, by such release, he must be taken to have voluntarily abandoned against all; and, consequently, it appears to us that no other joint contractor could afterwards have called upon the witness for contribution. And, upon the authorities, we cannot but think the great weight of them preponderates against the objection. Lord ALVANLEY, indeed, in *Cheyne v. Koops*, 4 Esp. 112, held that the competency of a witness under similar circumstances was not restored; observing that the parties were all bound in equity, and that if the defendant were dead or insolvent the plaintiff would have a right, by a bill in equity, to compel the parties to contribute, and the witness would, of course, be liable to his share. But an objection grounded on a possible insolvency or death can surely be no direct interest in the event of a suit. And again, Lord TENTERDEN also held, at Nisi Prius, in *Simons v. Smith*, Ry. & Moo. 29, that the competency of the witness, under similar circumstances, was not restored by the release. Neither of these cases was moved in Banc. Lord KENYON, in the case of *Young v. Bairner*, held the same opinion at Nisi Prius; but upon the case coming on to be argued before the Court, he expressed a different opinion, and a new trial was granted.

After all these cases, the point was discussed in Banc, in two cases of *Wilson v. Hirst and Another*, 4 Barn. & Adol. 760, (24 E. C. L. R. 156,) and *Jones v. Pritchard*. These cases are expressly in point where the witness and the defendant are the only partners, or the only co-contractors, and afford a strong authority in favour of the proposition that the witness is restored to his competency by a release from the defendant, although he may not be the only partner; for although it is urged that the cases are distinguishable from the present on the ground of the release having been given by all the partners, yet, for the reason before assigned, we think the competency of the witness to give evidence cannot be in any manner affected by the circumstance of there being other co-contractors besides the defendant.

As the witness, therefore, was rejected in this case, we think the rule for a new trial must be made

Absolute.

TRINITY VACATION.
IN THE HOUSE OF LORDS.

DOE dem. BURTWHISTLE against VARDILL.—p. 385.

(Error from the Court of Exchequer Chamber.)

A person born in Scotland, of parents domiciled there, but not married till after his birth, though legitimate by the law of Scotland, cannot take real estate in England, as heir.

In this case (*a*) the following question was submitted by the House of Lords, for the opinion of the judges :—

A. went from England to Scotland, and resided, and was domiciled there, and so continued for many years, till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland, according to the laws of that country. By the law of Scotland, if the marriage of the mother of a child with the father of such child takes place in Scotland, such child, born in Scotland before the marriage, is equally legitimate with children born after the marriage, for the purpose of taking land, and for every other purpose. A. died seised of real estate in England and intestate. Is B. entitled to such property as the heir of A.?

This question was argued on the 1st, 2d, and 3d of July, 1839, by the Attorney-General for the plaintiff in error, and by *Dampier*, for the defendant in error, before TINDAL, C. J., VAUGHAN, J., PARKE, B., BOSANQUET, J., GURNEY, B., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., and MAULE, B.; but a report of the argument would be superfluous, as the topics urged are so fully considered in the opinion of the judges; which was this day delivered by

TINDAL, C. J. My lords, the facts of the case upon which your lordships propose a question to her majesty's judges, are these :

A. went from England to Scotland, and resided and was domiciled there, and so continued for many years, till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland, according to the laws of that country. By the law of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child born in Scotland before the marriage, is equally legitimate with children born after the marriage for the purpose of taking land, and for every other purpose : A. died seised of real estate in England and intestate : and your lordships found this question upon the foregoing state of facts, viz. Is B. entitled to such property as the heir of A.?

And in answer to the question so proposed to us, I have the honour to state to your lordships, that it is the opinion of all the judges who

heard the argument, that B. is not entitled to such property as the heir of A. We have, indeed, reason to lament that we have been deprived of the assistance of one of our learned brethren who heard this case argued at your lordships' bar, the late Mr. Justice VAUGHAN; but as he had expressed a concurrent opinion upon the case, at a meeting held immediately after the argument, I feel myself justified in adding the authority of his name to that of the other judges.

My lords, the grounds and foundation upon which our opinion rests are briefly these: that we hold it to be a rule or maxim of the law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother: that this is a rule *juris positivi*, as are all the laws which regulate succession to real property; this particular rule having been framed for the direct purpose of excluding in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate: and that this rule of descent being a rule of positive law annexed to the land itself, cannot be broken in upon or disturbed by the law of the country where the claimant was born,—and which may be allowed to govern his *personal* status as to legitimacy,—upon the supposed ground of the comity of nations.

My lords, to understand the nature and force of this rule of our law, that the heir must be a person born in actual matrimony, in order to enable him to take land in England, by descent, and perceive at the same time the positive and inflexible quality of this rule, and how closely it is annexed to the land itself, it will be necessary to consider the earlier authorities in which that rule is laid down and discussed, both before and subsequently to the statute of Merton; and more particularly the legal construction and operation of that statute.

If we take the definition of *heir* which Lord COKE adopts from the ancient text writers, and which is borrowed originally from the Roman law, (Co. Litt. 7. b,) viz., that he is, “*ex justis nuptiis procreatus*,” the very description points at a marriage celebrated according to the rules, requisites, and ritual of the civil or Roman law. “*Operæ pretium est scire quid sint justæ nuptiæ*,” says Huber, (Lib. 23, tit. 2, *de Ritu nuptiarum*;) he adds, “*in promptu est Justiniani responsio: sunt eæ, quæ secundum præcepta legum contrahuntur*.”

But to refer to the Mirror of Justices, perhaps the very earliest of our text books, it is there laid down in page 70, as an admitted principle, “that the common law only taketh him to be a son whom the marriage proveth to be so.” Glanville, who wrote in the reign of Henry II., (probably about half a century before the passing of the statute of Merton,) in book 7, c. 13, states, that “neither a bastard, nor any person *not born in lawful wedlock*, can be, in the legal sense of the term, an heir; but if any one claims an inheritance in the character of heir, and the other party object to him that he cannot be heir, because he was not born in lawful wedlock, then, indeed, the plea shall cease in the king's court, and the archbishop or bishop of the place shall be commanded to inquire concerning such marriage, and make known his decision either to the king or his justices.” He then, in ch. xiv., gives the form of the writ, which will be found not unimportant to the present inquiry; namely, “The king to the Archbishop, Health.

W. appearing before me in my court, has demanded against R. his brother, certain land, and in which the said R. has no right, as W. says, because he is a bastard, born before the marriage of their mother. And since it does not belong to my court to inquire concerning bastardy, I send these unto you, commanding you, that you do in the Court Christian, that which belongs to you. And when the suit is brought to its proper end before you, inform me by your letter what has been done before you concerning it. Witness," &c. Your lordships will observe the form of this writ, how precisely it puts the objection against the heir's title upon the very rule of the English law, "that he was born before the marriage of his mother," by which it is necessarily implied, that the marriage of the parents had subsequently taken place. Now, if the question had been put generally on the fact whether *any* marriage had taken place, or upon the legality of such marriage as *had* taken place; to such a question of general bastardy, as it is called, the bishop would have found no difficulty in answering; for the answer to that question would have been purely and exclusively determinable by the spiritual law. But as the canon law, on the one hand, held that the subsequent marriage of the parents made the *antè-natus* legitimate; and as the common law of England, on the other hand, held that such *antè-natus* was not legitimate for the purpose of inheriting land in England; if the question had gone in the general form, the answer of the bishop would have certified such *antè-natus* to have been legitimate. The law, therefore, framed the question in the precise form contained in the writ; namely, a question of special bastardy: proving thereby how closely, and with how much jealousy the law adhered to the rule of descent before pointed out. Now the question so framed did obviously place the bishop in extreme difficulty in making answer thereto; a difficulty which was very much increased by the constitution of Pope Alexander III., which had been issued very recently before the time when Glanville wrote, viz., in the sixth year of King Henry II.; by which constitution (in part set out by Lord COKE, 2 Inst. 96) it was ordained, "that children born before solemnization of matrimony, where matrimony followed, should be as legitimate to *inherit unto their ancestors*, as those that are born after matrimony." And it is upon the subject of this constitution that Glanville is commenting in his fifteenth chapter, where he says, "upon this subject it hath been made a question, whether if any one was begotten or born before the father married the mother, such son is the lawful heir, if the father afterwards married his mother? Although, indeed, the canons and the Roman law consider such son as the lawful heir, yet, according to the law and custom of this realm, he shall in no measure be supported as heir in his claim upon the inheritance; nor can he demand the inheritance by the law of the realm. But yet, if a question should arise, whether such son was begotten or born before marriage or after, I should, as we have observed, be discussed before the ecclesiastical judge, and of his decision he shall inform the king or his justices. And thus, according to the judgment of the Court Christian concerning the marriage, namely, whether the demandant was born or begotten before marriage contracted or after, the king's court shall supply that which is necessary in adjudging or refusing the inheritance respecting which the dispute is, so that by its decision the demandant shall either obtain such inheritance, or lose his claim."

The bishops being placed in the difficulty of this *conflictus legum*, by reason of the precise form of the king's writ, at length, at the parliament holden at Merton, in the twentieth of Henry III. the statute was framed, which will be found to have a strong and direct application to the present question. That statute has not, upon the original roll, the title prefixed thereto, upon which observations were made at your lordships' bar, "that it shows the intention of the law to have been no more than to declare the personal status of those who are described in such statute. In the edition of the statutes published under the commission from the crown, there is no other than the general title, "*Provisiones de Merton*;" and no more argument can justly be built upon the title prefixed to some editions of the statutes than upon the marginal notes against its different sections. That statute, or provision of Merton, runs thus, viz. "To the king's writ of bastardy, whether any one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered that they would not, nor could not, make answer to that writ; because it was directly against the common order of the church. And all the bishops instanted the lords, that they would consent that all such as were born afore matrimony should be legitimate as well as they that be born within matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate. And all the earls and barons with one voice answered, that they would not change the laws of the realm, which hitherto have been used and approved."

It is manifest from Bracton, who lived and wrote in the time of Henry III., that shortly after the statute of Merton, this question of special bastardy ceased to be sent to the bishop, and became the subject of inquiry and determination in the king's courts. In book 5, c. 19, after stating the circumstances attending the statute of Merton, and also a subsequent council holden in the same year before the king, the archbishop, the bishops, earls, and barons, whose names he gives, it is ordered, that the words in which the writ shall go to the bishop shall be, "whether such a one was born before espousals or marriage, or after, and that the ordinary shall write back to our lord the king in the same words without any evasion or subtilty;" and he then states, it was further ordered, at that council, that "for the reasons before given, and of such common consent, it may be in the election of our lord the king whether he will demand that inquisition to be taken before the ordinary or in his own court, because, when the exception is properly taken, the answer ought not to be obscure." And, accordingly, it will be found by reference to the year books, that from the time of Edward III. the distinction became settled, that general bastardy shall be tried by the ordinary, special bastardy shall be tried *per pais*; (see the various authorities collected in Viner's Abridgment, tit. *Trial. Bastardy*.)

My lords, the extent of the dominions of the crown at the time of the passing of the statute of Merton, demands particular attention. Normandy, Aquitaine, and Anjou, were then under the allegiance of the King of England, and had been so, at least from the commencement of the reign of Henry I. Many of the nobles and other subjects of the king had large possessions both in England and in the countries beyond sea. Those born in Normandy, Aquitaine, or Anjou, (as in subsequent periods of our history, those born in Guienne, Gascony, Calais, or Tournay,) whilst under the actual dominion of the crown, were natural

born subjects, and could inherit lands in England. (*Calvin's Case*, 7 Rep. 1 b.) Many of the very persons who attended at the coronation of Henry III., the occasion on which the parliament met at Merton, and the statute was passed, both bishops, and earls, and barons, are known from history, and would so appear from their very names and titles to have been of foreign lineage, if not of foreign birth, and were at all events well acquainted with the rule of law, which was then so strongly contested. Yet notwithstanding the rule of the civil and the canon law prevailed both in Normandy, Aquitaine, and Anjou, by which the subsequent marriage makes the *ante-natus* legitimate for all purposes and to all intents, and notwithstanding the precise question then under discussion was, whether this rule should govern the descent of land locally situate in England, or whether the old law and custom of England should still continue as to such land, under which the *ante-natus* was held incapable to take by descent, there is not the slightest allusion to any exception, in the rule itself, as to those born in the foreign dominions of the crown, but the language of the rule is in its terms general and universal as to the succession to lands in England. The question is, whether, after the declaration made by that statute, one of the king's subjects born in Normandy, or Aquitaine, or Anjou, under the circumstances supposed by your lordships, could have inherited land in England? It is not so much a parallel case with the present, it is the very case itself; and it seems impossible to contend that such would have been held to be the law. In the first place, there was no other form of any writ to the bishop, than the old form given in Glanville and Bracton, which raises the express point, whether the claimant was born or not before espousals and matrimony of his father and mother; and if the question was brought before a jury, as afterwards became the course of proceeding, then there was no other than that precise issue which could be raised upon the record. Further, if the question was sent to the bishop, it must have been sent to the bishop of the diocese where the action was brought, that is, where the land was situate; and not to the bishop of the diocese where the party whose legitimacy is disputed was born: see the Book of Assize, 35, pl. 7; which case seems not obscurely to indicate that if the birth has been in France, the trial would be still before the English bishop; for SKIRWORTH, a judge of C. P., is made to say there, "You may carry your proofs before him in what place you please, in England, or from France." Again, the contest above adverted to, was a contest between the ancient law and custom of England on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in England; the canon and civil law being acknowledged, and prevailing in England in all other respects, with the single exception of its application to the descent of land: the same canon and civil law prevailing in the foreign dominions of the crown, generally and without any exception. There seems, therefore, no reasonable or probable ground for the surmise of any *intention* in the law-makers of that day, that with the general refusal and repudiation of this rule of the civil and canon law as to the hereditary succession to land in England, there should be a tacit exception in favour of a claimant born beyond the seas. Again, the law and custom would rather seem to be one which applies to the land itself, and not to the person only of the claimant, according to an observation of Bracton, in the place above cited, when discussing the very point of the exception on the ground of

bastardy, he says, "that every kingdom hath its own customs, differing from those of others. For there may be one custom in the kingdom of England, and another in the kingdom of France, as to *successions*." And it would be singular, indeed, if any such exception existed, that neither Bracton, who wrote with so much diffuseness on this very question, at the time of this notable refusal of parliament to alter the law, nor Fleta, nor any of the other early writers should have left the slightest vestige of an allusion to such exception in the rule. On the contrary, the observation of Lord COKE, 2 Inst. 98, although not made in any case in a court of law, proves in a manner which leaves no doubt what would have been the opinion of that great lawyer upon the point now under discussion, if it had arisen in his time. "Some have written," he says, "that William the Conqueror being born out of matrimony, Robert, his reputed father, did after marry Arlot, his mother, and that thereby he had right by the civil and canon law: but that is *contra legem Angliæ*, as here it appeareth." This is in effect saying, that although born in Normandy, and legitimated in Normandy by the subsequent marriage of his father and mother there, so that he could inherit land in Normandy, yet, as to land in England, he would not take it by descent. For the same would be the law of descent of a kingdom, and of land within it. This is the very case now put to the judges by your lordships.

It therefore appears to be the just conclusion from these premises that the rule of descent to English land, is, that the heir must be born after actual marriage of his father and mother, in order to enable him to inherit; and that this is a rule of a positive inflexible nature, applying to and inherent in the land itself which is the subject of descent: of the same nature and character as that rule which prohibited the descent of land in any but those who were of the whole blood to the last taker; or like the custom of gavelkind or borough English, which causes the land to descend, in the one case, to all the sons together, in the other, to the younger son alone.

And if such be, as it appears to us to be, the rule of law which governs the descent of land in England, without any exception, either express or implied therein on the score of the place of birth of the claimant, it remains to consider, whether by any doctrine of international law, or by the comity of nations, that rule is to be let in by which B. being held to be legitimate in his own country for all purposes, must be considered as the heir at law in England?

The broad proposition contended for on the part of the plaintiff in error, is, that legitimacy is a personal status, to be determined by the law of the country which gives the party birth; and that where the law of that country has once pronounced him to be legitimate, he is, by the comity of international law, to be considered as legitimate in every other country, and for every purpose. And it is then contended, that as by the Scotch laws there is a *presumptio juris et de jure* that, under the circumstances supposed, the parents of B. were actually married to each other, before the birth of B., so, such presumption of the Scotch law by which his legitimacy is effected, must also be adopted and received to the same extent in the English courts of justice.

Now there can be no doubt but that such marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be

considered and treated as a perfect and complete marriage throughout the whole of Christendom. But it does not therefore follow, that with the adoption of the marriage contract, the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated. That the marriage in question was not celebrated, in fact, until after the birth of B., is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow, then, that because the Scotch hold a marriage celebrated between the parents *after* the birth of a child, to be conclusive proof of an actual marriage celebrated before, a foreign country which adopts the marriage as complete and binding as a contract of marriage must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect; nothing beyond the general proposition, that a party legitimate in one country is to be held legitimate all over the world. Indeed, the ground upon which this conclusion of B.'s legitimacy is made by the Scotch law, is not stated to us: and we have no right to assume any fact not contained in the question which your lordships have proposed to us. We may, however, observe, that in the course of the argument at your lordships' bar, the ground has been variously stated upon which the laws of different countries have arrived at the same conclusion. It was asserted that by the law of Scotland, the subsequent marriage is not to be taken to be the marriage itself, but only evidence, though conclusive in its nature, of the marriage prior to the birth of B.: That the canon law rests the legitimacy of the son born before such marriage upon a totally different ground; viz., that having been born illegitimate, he is made legitimate, *legitimus*, by the subsequent marriage, by a positive rule of law, on account of the repentance of his parents; whereas, by the Scotch law, a marriage previous to his birth is conclusively presumed, so that he always was legitimate, and that his parents had nothing to repent of. Pothier, on the other hand, (*Contrat de Marr.* part 5, c. 2, art. 2,) when he speaks of the effect of a subsequent marriage in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the customs at Troyes. "*Les enfans hors mariage de soluto et solutâ, puis que le père et la mère s'épousent l'un l'autre, succèdent et viennent à partage avec les autres enfans, si aucuns y a ;*" and then adds, it is a common right received throughout the whole kingdom.

Now, it could never be contended by any jurist that the law of England, in respect to the succession of land in England, would be bound to adopt a positive law of succession like that which holds in France: the distinction being so well known between laws that relate to personal status, and personal contracts, and those which relate to real and immovable property; for which it is unnecessary to make reference to any other authority than that of Dr. Story, in his admirable *Commentaries on the Conflict of Laws*; see section 430, et seq., where all the authorities are brought together. And if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for the introduction into the English law of descent, not only of the contract of marriage observed in another country, but also

of a fiction with respect to the time of the marriage? that is, in effect, of a rule of evidence which the foreign country thinks it right to hold.

But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that B., legitimate in Scotland, is to be taken to be legitimate all over the world, the question still recurs, whether, for the purpose of constituting an heir to land in England, something more is necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, one other step is necessary; namely, to prove that he was born after an actual marriage between his parents. And if this be so, then, upon the distinction admitted by all the writers on international laws, the *lex loci rei sitæ* must prevail, not the law of the place of birth.

My lords, in the course of the discussion, some stress appears to have been placed on the argument, that if B. had died before A. the intestate, leaving a child, such child might have inherited to A., tracing through his legitimate parent: and then it was asked,—if the child might inherit, why might not the parent himself inherit? But the answer to that supposed case appears to be, that if the parent be not capable of inheriting himself, he has no heritable blood which he can transmit to his child, so that the child could not, under the assumed circumstances, have inherited; and the question therefore becomes, in truth, the same with that before us. The case supposed, would be governed by the old acknowledged rule of descent, "*Qui doit inheriter al pere doit inheriter al fitz.*"

My lords, the two decided cases that have been relied upon in the course of argument, of *Sheddon v. Patrick*, decided in the House of Lords in 1809, and that of the *Strathmore Peerage*, (a) do not, upon consideration, create any difficulty. Those cases decide no more, than that no one can inherit without having the personal status of legitimacy, a point upon which all agree; but they are of no force to establish the main point in dispute in this case; viz., that such personal status is sufficient of itself to enable the claimant to succeed as heir to land in England.

My lords:—In conclusion, it may be right to observe, that the same rule of law which is held to apply to the present case, that of a claim by descent as heir to A., must be held equally to govern in a case escheat for reverter. If, upon the death of A. under the circumstances above supposed, the lord had brought his writ of escheat for the land on a claim that it had fallen to him *propter defectum sanguinis*; or if the heir of the donor had brought a *formedon* in the *reverter*, contending that the estate tail was spent, and his reversion let in; your lordships must hold, if B. can take as the heir of A., that both the lord and the reversioner are barred of their claim. And yet it would seem difficult to maintain, upon any legal principle, that the condition annexed by the law to the original grant of the land, or the right to the reversion, vested in the line of the donor *secundum formam doni*, both of which may have existed many centuries before England and Scotland became one kingdom, should be in any manner controlled or varied by a rule derived from the law of Scotland.

Upon the whole, in reporting to your lordships as the opinion of the judges, that B. is not entitled to the real property as the heir of A., I am bound at the same time to state, that although they agree in the result, they are not to be considered as responsible for all the grounds

(a) See 2 Jac. & W. 547.

and reasons on which I have endeavoured to support and to explain that opinion.

LORD BROUGHAM. My lords, this was an ejectment brought to recover lands situated in Yorkshire, and a verdict being taken, subject to a special case for the opinion of the Court of King's Bench, (from which the record came,) with leave to either party to turn it into a special verdict, it came before this House by writ of error, and was twice argued; first, in 1830, when the judges attended and gave their opinion through the chief baron (Sir WILLIAM ALEXANDER,) and again in 1838, when your lordships also had the assistance of the judges, who have not given their opinion through the chief justice of the Common Pleas.

The question raised by the special verdict, and argued upon these several occasions, is this:—Whether a person born in Scotland of parents domiciled there, and married there, but after his birth, and who, by the law of Scotland, is legitimate in consequence of that subsequent marriage, can take real estate in England as *heir*? The court below held that he could not, 5 B. & C. 438, (11 E. C. L. R. 266;) and the judges have all agreed in this opinion.

When, in 1835, I took the liberty of calling the attention of your lordships to this question, I pointed out what appeared to me to have been material defects in the argument, both below and here, on the part of the defendant in error, that is, in behalf of the judgment below. The learned and elaborate opinion last given by the judges, has made very valuable additions to the clear and able, though more succinct statement given upon the former occasion. It is now for your lordships finally to dispose of the case; and I deem it my duty to offer a few remarks upon the subject on account of its great importance, and more especially of the bearing which the principles connected with it, and about to be recognised in your decision, must, almost unavoidably, have upon other questions.

While I willingly acknowledge the great value of the assistance which we have received from the learned judges upon this occasion, I feel convinced that there are several matters which still remain to be considered, and some difficulties to be got over, before we can with perfect confidence rely upon the conclusion at which they have arrived. But I shall rest satisfied with referring generally to the scope of the argument which I submitted to your lordships upon the former occasion, (1835,) and with observing that a considerable portion of it is left untouched by the present argument of the learned judges; and that I, on the other hand, should find it not difficult to reach a conclusion the opposite of theirs, while I yet admitted a very large portion of their positions. In the observations which I am about to offer upon their argument, I purposely abstain from any thing more than thus generally referring to its scope as contrasted with that of the opposite reasoning. What I wish further now to state, relates to the detail of their argument, and must be taken as independent of any general answer to it, for which I refer to what I before submitted to your lordships.

The authorities cited by the learned judges, especially in the earlier part of their opinion, do not seem conclusive; as, for example, Lord COKE's definition of heir, *ex justis nuptiis procreatus*, and the text in the Mirror, that "the law only taketh him to be a son whom the marriage proveth to be so." These, and other authorities, only prove the dependence on and connection of legitimacy with marriage, or of in-

heritable quality with marriage, which in no part of the argument ever could have been denied. The text in Glanville seems at first to take the distinction between legitimacy generally or absolutely, and legitimacy by being born in lawful wedlock, as connected with right to inherit, for it says, "neither a bastard, *nor* any person *not born in lawful wedlock* can be an heir." But in a subsequent chapter the writ is given, and that sets forth the denial by the demandant of the tenant's right, "because he is a bastard born before marriage of the parents," which seems to indicate that the marriage was required to precede the birth only in order to negative the bastardy. The writ, indeed, adds, that it does not belong to the temporal court to inquire "concerning bastardy, wherefore, it is sent to the Court Christian."

It is said that the law frames the writ for the purpose of preventing the Court Christian from answering the question according to the canon or civil law. Nevertheless, the bishops were not compelled by the exigency of the writ to confine themselves to the question, whether the party was born before or since marriage; because the bastardy is introduced in terms as well as the birth and marriage. A council, however, was held soon after the parliament of Merton, and at that council it was directed that the writ should merely require the ordinary to examine the date of the birth, and whether before or after marriage, to prevent, as is said, "any evasion or subtilty" on the part of the ecclesiastical authorities.

The argument of the learned judges upon the statute of Merton is deserving of great attention, nor can I at all go along with those who have contended, both in the court below, and here, that it is not a statute, but a refusal to make a statute. Such was the construction of the learned chief justice, in the able argument which he held, when at the bar in the King's Bench, against the decision. This statute is only different from other statutes, inasmuch as it is in substance declaratory, and in form somewhat different from that of declaratory acts in modern times. It is a distinct declaration of what the law had ever been before the statute, and a refusal to alter it. But it is to be observed that the bishops, in calling for the alteration, put their demand expressly on the ground that *antenati* are legitimate by the canon law; and it is in consequence of their legitimacy that the bishops claim the recognition of their right to inherit. The barons only affirm that such *antenati* had no right of inheritance by the common law, without saying whether by the common law they were legitimate or not, though assuredly the common law is understood to be declared by the statute, against their legitimacy, universally, and in all respects as well as with respect to feodal inheritance. But I agree that it somewhat aids the view taken by the learned judges, when we find that special bastardy ceased from the time of the statute to be tried by the bishop, and has ever since been tried *per pais*.

It may be remarked that the proceeding appears from the Grande Constumiere to have been a writ of bastardy generally directed to the ordinary. But the description of bastards there given is worthy of attention: "*sont bastards ceulx qui sont engendres hors mariage,*" and then immediately it goes on to say, "*mais ceulx qui sont engendres devant le mariage, si les parens epousent depuis la naissance, ils sont legitimes.*" So that apparently, though born *de facto* out of wedlock, they were in contemplation of law born within wedlock. It may be further observed, that Littleton, s. 188, in treating of villenage, gives

as the reason why a bastard is *quasi nullius filius*, that he cannot be heir to any "pur ceo que il ne poit enheriter a nulluy."

The learned judges object to the observations made at the bar upon the title prefixed to the chapter in question of the statute, namely, that this title showed the enactment was only intended to be a declaration of the personal status. This title, say the learned judges, is not to be found in the original statute; and they refer to the edition published by the record commissioners, where "*provisiones de Merton*" is the only heading of the act; and they add, "that no more argument can justly be built upon the title prefixed in some editions, than upon the marginal notes against the different sections." If, however, the learned counsel at your lordships' bar were led into any error in this matter, they had very high example in going astray, no less than that of the court below, where this writ of error is brought, and where, when the cause was first decided, one of the learned judges argued in support of the decision now under revision, on the ground of the heading or title: "We have no occasion," says Mr. Justice BAILEY, "in order to answer the question who is *hæres*, to go beyond the statute. The title of it, '*He is a bastard who is born before the marriage of his parents*,' not restraining it to those born in England. 5 B. & C. 453, (11 E. C. L. R. 266.) For myself, I consider the assistance to be equally slender, which the one argument and the other derives from this title, even supposing it to have been the one given by the legislature to the chapter of the act, which it appears not to have been: Indeed it could not have been; for no titles at all were put on statutes till the eleventh Henry VII., as is said by TREBY, C. J., cited in *Chance v. Adams*, 1 Ld. Raymond, 78. (a)

I am inclined to regard as the most important part of the argument of the learned judges, their observations on the state of the crown dominions at the making of the statute. This point had been made in the court below, but without explanation, and not much dwelt upon. The Lord Chief Justice ABBOTT takes it, though only in general terms, yet quite intelligibly. 5 B. & C. 452, (11 E. C. L. R. 266.) The learned judges here have very usefully explained the argument, and illustrated it by important remarks. They have contended that an *antenatus* within the king's ligeance, but born in Normandy, (which, by the way, had for above thirty years before the statute ceased to be *English de facto*, though it was not formally ceded till twenty-five years after,) Aquitaine, and other provinces where the civil law prevailed, could not have inherited land in England under the statute, chiefly because no exception is there made *per expressum* of such persons, although the connection of the countries would naturally call the attention of the legislature to the case, and because no tacit or implied exception can be supposed in favour of the canon law for Norman subjects of the crown, where the express words of the act refuse to adopt the same canon law for English subjects of the crown. The silence of contemporary writers, as Bracton, and the author of Fleta, is very justly referred to in aid of the same conclusion.

The other reasoning of the learned judges on the passage in Bracton, and which, as well as the reference to the customs of gavelkind and borough English was urged below, seems there to have met with a sufficient answer in the argument at the bar, that those authorities apply to English parties, and those customs to the rule of succession, none of which matters are disputed; so that the authorities may well

(a) See also *The Attorney-General v. Hutchinson*, Hardr. 324.

stand with the opposite argument. No doubt, if the fact of being born within lawful wedlock be as much a necessary quality to the character of heir, by the custom of England, as the fact of being youngest son is to being heir by the custom of borough English manors,—if that fact of being born within lawful wedlock can only be adjudged of according to the English law, and admits of as little dispute as the fact of being eldest or youngest child,—there is, and there must be, an end of the question. But, unless these things are so, the cases put have no useful application to the one in hand. So, of the proposition repeatedly affirmed below, and now largely stated by the learned judges here, that this law or custom is something inherent in the land, a quality of the land itself, as it were, and not of the claimant. This, of course, would in one sense decide the question, but then it would beg it also. In any other sense it leaves the question untouched; for the dispute would still arise, what description of person is that to which the descendible quality of the land carries it?

The argument drawn by the learned judges from the observation of Lord COKE, in 2 Inst., on the title of William the Conqueror, had been used in the court below. 5 B. & C. 448, (11 E. C. L. R. 266.) The passage is not very clear; but where Lord COKE says, that some held William the Conqueror “to have had right by the civil and canon law,” (in consequence of the subsequent marriage of his parents,) he is, I presume, supposed to mean, right to the crown of England as nearest maternal relation to Edward the Confessor, which he certainly was, being grandson of his maternal uncle, Richard of Normandy. That this could give him no right,—to the exclusion of the male branch represented by Edgar Etheling, the Confessor’s great nephew, and who, being grandson of his elder brother, Edmund Ironside, had, indeed, a title paramount to that of the Confessor himself,—it is quite clear; and although the Conqueror appears to have called himself *Rex hereditarius* in some charters, historians and antiquaries are agreed, that this could only mean heir under the supposed will of the Confessor, for the only dispute as to his title that has ever been raised is, whether he took by the sword, or as conquæstor by purchase, (Spelman’s Glossary, *Conquæstor*.) under the supposed will or gift of the Confessor; about the existence of which much controversy has always been held. As heir,—as one taking by inheritance,—no person has ever asserted his title; and if he took under the Confessor’s gift, or will, his legitimacy was really of as little importance, as it was to the other and more secure title which he derived from his sword. If, indeed, Lord COKE, or rather those whom he refers to, for any reason supposed the male branch to be extinct, then we can understand the passage, always supposing that a mother’s relative could succeed, and in that case the passage might bear upon the argument; or it may bear upon it, if we suppose Lord COKE puts the case hypothetically, or refers to some who did consider the male branch extinct. Still, this seems not very intelligible; for it is believed, that Edward the Confessor had called them over, as his end approached; that his nephew, Edward the outlaw, or exile, came back and died here; but wherever he died, it is quite certain that he left Edgar Etheling his son, who was notoriously in England at the conquest, was made to join in some proceedings to confirm William’s title, and afterwards was engaged in an unsuccessful rebellion against him. The passage, therefore, is really not very easily explained. Nor is any light thrown on it by the reference to the author-

ities cited: William of Malmshury, book iii., Ingulphus, lib. vi. cap. 19. and the Grande Coustumiere, cap. 27. The first of these, at the place referred to, only says that William's father married his mother, "*aliquando justæ uxoris loco habens*;" and the second reference (to Ingulphus) seems erroneous; for there are no books and chapters in Ingulphus, at least in any editions which we now have, or which are known to have existed; but all that he says of William (who was his patron, and of whom he writes largely, and in praise and defence) is, that the Confessor, aware of Edgar's weakness, turned his thoughts towards William, taking into consideration "*cognationem suam*," an expression which he repeats afterwards. The text of the Grande Coustumiere (which is the third reference) merely gives the law of bastardy and legitimation generally; nor can I see any reference to William's case in the Commentaries, though I will not undertake to say there may not be some such reference. In the text cited by Lord COKE there is certainly none; and in the Commentaries I can find none. But the difficulties do not end here; because even if Edgar were set aside for imbecility, still the Conqueror was not next heir; for he was only the Confessor's cousin-german, by the mother, once removed; (Welsh-nephew, as we say, or nephew *à-la-mode de Bretagne*, as the French have it; and this accounts for some writers calling the Confessor cousin, and some, uncle to the Conqueror;) whereas, Edgar's sister,—afterwards married to Malcolm, in Scotland,—was his great niece by his elder brother. And, moreover, we have now been all along supposing that the connection of William with the Confessor, through the *mother* of the latter only, made no difference; Whereas, suppose the whole paternal relations had been extinguished, it is difficult to see how, upon any feudal principle, any person could inherit who was not of the blood of the English royal family. William's only connection with England was, that his aunt had been married to an English king. Consequently, it seems quite impossible to understand how he ever could be considered as "having right," even on the supposition that the lawful course of succession were by nomination or selection from among the whole members of a given royal family. Subject to these observations we may, perhaps, consider this passage in Lord COKE as some kind of indication of his opinion, always supposing the passage to be correct. But there can be but little doubt that these observations make it exceedingly uncertain whether Lord COKE ever wrote it, as we now have it; in a work, too, be it observed, which was not published in his lifetime. If there were no such uncertainty hanging over the passage, its importance to the argument would be undeniable; it would amount to neither more nor less than Lord COKE's opinion upon the case at bar. But it is probable that some such considerations as those to which I have been adverting operated in preventing any attention being paid to this authority in the court below, where it was cited, but occasioned no remark either at the bar or from the bench.

The learned judges refer to the illustrations drawn from a person supposed to claim through the *antenatus*, he having predeceased his father; and they hold this to be disposed of by the opinion given on the principal case or question; inasmuch as, if incapable of inheriting himself, he could not transmit heritable blood to his issue. And, generally speaking, no doubt, it would be so; although, contrary to Lord COKE's supposed opinion as to issue of aliens inheriting to each other collaterally, it has been decided that a brother may succeed to a brother, the only

connection of the two being through an alien father, who had no inheritable blood; *Collingwood v. Pace*, 1 Levinz, 59; where the opinion generally ascribed, and among others, by Blackstone, to Lord COKE, is denied by the majority of the judges to be his, and by none of them affirmed to be so. But a nearer case to the present may be put:—where, by the law of the country, as in Scotland, and on the continent, legitimation *per subsequens matrimonium* is admitted, it seems that the authorities are agreed in holding that, if the *antenatus* dies before the marriage of his parents, leaving lawful issue, the issue shall take as heir to his grandfather, though he must claim through a person who lived and died illegitimate. Nor is this case of one who never could himself be heir, transmitting inheritable blood to his issue, confined to those countries and that law of legitimation. We have an example in our own law in the case of bastard *eignè*; and it is worth while to consider how this is treated, though I know not that it materially impeaches the general conclusion to which the argument of the learned judges leads them, unless by showing how entirely the law proceeds upon the supposition that it is his bastardy, and his bastardy only, which excludes the *antenatus* from succession. Littleton, in sections 399, 400, says that the issue of the bastard *eignè* who, having entered, died seised, shall have the land by reason of the colour which his father had as heir; “for, by the law of holy church, he is *mulier*, albeit by the law of the land he is bastard.” Lord COKE, in commenting upon the words of Littleton, that in such a case the *mulier puisnè* is “without remedy,” says that the descent from the bastard *eignè* not only takes away the entry, like other descents which leave the party to his action, but makes the issue of the bastard become lawful heir; adding that, even if the *mulier* be within age, he is barred, because the bastard’s issue is become in judgment of law lawful heir; “for the law,” says he, “doth prefer legitimation before the privilege of infancy.” Collateral heirs, too, are barred, as well as the *mulier*; and the bastard becoming a monk professed, which is a civil death, has the same effect; his issue succeeds during the natural life of the bastard, and the legitimate heir is barred. In the 2d Institute, Lord COKE, as a confirmation of the doctrine, gives the record of a judgment in the 18th Edward I., showing that the *mulier* cannot have an assize of *mort d’ancestor*; and upon the ground that the bastard *eignè* has entered as heir; and the reason assigned by Lord COKE is, “that the bastard is accounted of the blood with the *mulier puisnè*.” 2 Inst. 97. But in Coke Littleton, 244 b, he puts the case which has been referred to from the law of Scotland and the continent, of the bastard *eignè* dying in his father’s lifetime and leaving issue; this son enters as heir to the grandfather and dies seised; the *mulier* is barred; the “descent,” says Lord COKE, “binds him.” Now this cannot be from the *laches* of the *mulier* during the bastard’s life; for by the supposition nothing had been done by the bastard to make the *mulier* claim; nor could he claim, for the grandfather was still alive. The *laches* was in the grandson’s life; so that here the reason given for the law fails, viz., that it is unjust to treat a person all his life as legitimate, and bastardize him after his death; for here the *antenatus* never was treated as legitimate at all—he lived and died a bastard, yet his issue, claiming through him who had no inheritable blood, entered as heir to the common ancestor, and by dying seised barred the lawful issue. Although, however, this consideration somewhat contradicts the answer given by the learned judges to the argument at the bar, it yet furnishes

another answer to that argument by showing that, if it proves any thing, it proves too much, since, in the case of bastard *eignè* there is no question whatever of his right being excluded in the common case, (of English birth and domicile,) unless where there has been an entry and dying seised without counter claim.

The short observation made by the learned judges on the cases of *Sheddon v. Patrick* and the *Strathmore* peerage, appears hardly to be satisfactory. "These cases," it is said, "only decide that no one can inherit without the personal status of legitimacy, and do not establish the main point in dispute, that such personal status is sufficient ground for claiming English real estate as heir." It appears that these cases establish somewhat more than the first of these positions; and, although they do not decide the second, they appear to give it much countenance. They show that the quality, whatever it is, that must be possessed by a claimant in order that he may take land or houses in Scotland, is given to or withholden from him according to the law, not of Scotland, where the real estate lies, but of the country where his birth and his father's marriage and domicile were. Whether that quality be called legitimacy, or any thing else, is not material; nor is it material whether the quality is required in relation to the property by some positive statutory enactment of the country where it lies, or only by the common law of that country, or by some statute, like that of Merton, which declares what the common law always has been. The land in Scotland is impressed with a particular quality, that of being descendible to the *antenati*, where the parents have intermarried; it is of such a nature as not to descend upon the *mulier puisnè*, but upon the bastard *eignè*; while in England it is of such a nature as to descend to the *mulier*, and not to the bastard. The one quality is as firmly fixed in the soil of Scotland as the other is in that of England. Then what have the courts, and what has the House decided in those celebrated cases? That, notwithstanding the inherent descendible quality, and notwithstanding the general rule of the *lex loci rei sitæ*, so much relied on by the learned judges, both below and here through their whole argument, the law of the country where the property is must bend to the law of the domicile, marriage, and birth; and because the latter law excludes *antenati* from legitimacy, they shall be excluded from the succession to which the former law calls them. The Scotch common law says, "Let the land go to the *antenatus*; such is its descendible quality." The English common law says, "Let the land not go to the *antenatus*." The question and the only question is, have we a right to look beyond the fact, or to ask any but one question, namely, whether a person is *antenatus* or *postnatus*? Whether his parents were married or not at his birth? Are we bound by the simple fact, or may we look to the view taken of it by the law of the foreign country to which the claimant and his parents belonged? The decided cases say in the instance of Scotland, that we may and must look to the foreign law: that the subsequent marriage is immaterial for succession in Scotland, if it is immaterial for legitimation in the claimant's country; and the question is, whether, according to the principle of those decisions, it is possible to exclude all reference to the foreign law where the same kind of question arises as to English succession. It is very possible that the principle of the cases may be inapplicable. This may possibly be proved by argument; but it can hardly be said to have been proved by the only remark made on these cases in the statement of the learned judges. And this scanty discus-

sion of those cases is the more to be lamented, because in deciding the present question below, the Court expressly referred to this House as the place where *Sheddon v. Patrick*, and the *Strathmore* peerage would meet with ample attention as to their bearing upon the argument.

The learned judges have given no opinion upon the question, whether or not a person legitimated by subsequent marriage in a country where that law prevails, is therefore legitimate all the world over: nor, perhaps, was it incumbent on them to argue this for the purpose of answering the question put to them by the House. They contend that the statute, or rather the common law recognised and declared by the statute, requires something beyond mere legitimacy to make an heir to English real estate. They agree with the Court below, that legitimacy alone is not sufficient; it must be, as was there said, 5 B. & C. 454, (11 E. C. L. R. 266,) legitimacy *sub modo*—legitimacy and being born in wedlock. Consequently, they appear plainly to admit that a person may be legitimate for all other purposes, and yet incapable of taking land by descent.

In another case, *Monro v. Monro*, which has been decided to-day, we held here as it had been held in the court below, that a party is entitled to take real estate by descent as legitimate according to the law of the country where it lies, who is bastard by the law established in the country of the birth and marriage. In the courts which administer that law, (the law of England in the case put,) would the party be considered as bastard or legitimate when any right unconnected with real property was claimed? If bastard, then the same person is legitimate in one country and not in another,—bastard where born, and legitimate where the parties are domiciled: though some of the judges, with whom we agreed in that case, held this to be a solecism in law, considering it clear that the status must be everywhere the same: if legitimate, then it follows that the question of personal status depends on the law of foreign countries, and that the law is imported into England as to the consequences of the marriage contract, although the *lex loci contractus* alone regulates the constitution of that contract.

But which way soever we may hold as to these questions, the principles of the two decided cases referred to are quite consistent with that of the last-mentioned case decided to-day: they are not so easily reconciled to the judgment at present before your lordships.

Having stated what occurs to me upon the arguments of the learned judges,—again expressing my high sense of the service which they have rendered by the great attention bestowed upon the subject,—I rest satisfied with intimating my opinion upon the difficulties which still beset the question, and the anomalies likely to arise from the future application of the principles countenanced in the decision; and though I shall not move your lordships to give judgment for the defendant in error, if any noble and learned friend move, I shall offer no opposition.

LORD CHANCELLOR. My lords, I was not in your lordships' House when this case was first argued, but I was present at the argument when the learned judges were present, I gave my attention to the opinion expressed by the lord chief justice, and I entirely concur in that opinion. I am extremely satisfied with the ground upon which they put it, because they put the question on a ground which avoids the difficulty which seems to surround the question of interfering with those general principles peculiar to the law of England, and which seem at first sight to interfere with the decisions to which the courts have come.

Under these circumstances, as my noble and learned friend does not move, I move that the House give

Judgment for the defendant in error.

IN THE HOUSE OF LORDS.

BOOTH, Baronet, and Others, against The Bank of ENGLAND.—p. 415.

A London Joint-stock Bank agreed with a bank in Canada, that G. P., manager of the London Joint-stock Bank, but not a partner therein, should accept bills drawn by the Canadian bank payable at a date earlier than six months, and that the London Joint-stock Bank would provide funds for the due payment of such bills: Held,

1. That the acceptance of such bills, in execution of such agreement, was unlawful, regard being had to the acts in force respecting the Bank of England:
2. And would not have been lawful, even if the London Joint-stock Bank, at the time of such acceptances, had, in their hands, funds of the Canadian bank equal to the amount of the bills:
3. Nor, if without such funds in the hands of the London Joint-stock Bank, the bills had been accepted by G. P. on the credit of a contract by the Canadian bank, to remit such funds to meet the acceptances: and,
4. That the Bank of England might maintain an action against the London Joint-stock Bank, founded on such transactions.

UPON an appeal from a decision of the Master of the Rolls, in this cause, it appeared that

The London Joint-stock Bank, under circumstances which would have made it illegal in them as a company, and a violation of the rights and privileges of the Bank of England, to have accepted and issued the bills hereinafter mentioned, if drawn upon them, entered into an agreement with a bank in Canada to procure bills drawn by such bank upon George Pollard, the manager of the London Joint-stock Bank, but not a partner or shareholder therein, to be accepted by the said George Pollard, and to provide funds for the due payment of such bills, the money transactions arising therefrom being, in the account between the two banks, to be treated in all respects as transactions between the said two banks.

Upon this state of facts the following questions were proposed by the House for the opinion of the judges:—

1. Was the acceptance of such bills by the said George Pollard, in execution of the said agreement, lawful; regard being had to the acts in force respecting the Bank of England?
2. Would the acceptance of such bills be lawful, assuming that the London Joint-stock Bank, at the time of such acceptances, had funds in their hands on account of the bank in Canada, equal to the amount of the bills so accepted?
3. Would the acceptance of such bills be lawful, assuming that the London Joint-stock Bank had not, at the time of such acceptances, any funds in hand belonging to the bank in Canada, but that such bills were accepted on the credit of a contract by such bank to remit sufficient funds to the London Joint-stock Bank to meet such acceptances before the time at which the bills would become payable?
4. Could the Bank of England maintain any action against the London Joint-stock Bank, founded upon such transactions, under either of the states of circumstances above supposed?

The questions were argued before the House by Sir *W. W. Follet*, and *Kindersley*, on behalf of the appellants, and by Sir *F. Pollock* and *Pemberton* on behalf of the Bank of England.

For the Bank of England it was contended, that the acceptances in question were a violation of the express terms of the acts of parliament conferring exclusive privileges on that bank, and for which privileges that bank had paid a very large valuable consideration: and

That if such acceptances were not a violation of the letter of such acts, they were a fraudulent evasion thereof.

For the London Joint-stock Bank it was argued, that the bills of exchange were not the bills of the London Joint-stock Bank.

That the acceptance of the said bills was not the acceptance of the London Joint-stock Bank.

That the London Joint-stock Bank never—in the language of the statutes passed for the protection of the Bank of England—"borrowed, owed, or took up money on" the said bills. (a)

That the London Joint-stock Bank never borrowed, owed, or took up money in England on the said bills.

That even if the acceptance of the said bills were the acceptance of the London Joint-stock Bank, such acceptance was not in violation of the privileges of the respondents; and

That the acts of parliament, passed in the eighth and ninth years of King William the Third, in the sixth year of Queen Anne, in the thirty-ninth and fortieth years of King George the Third, in the seventh year of King George the Fourth, and in the third and fourth years of King William the Fourth, do not prevent and were not meant or intended to prevent banking copartnerships consisting of more than six persons, carrying on business in London, from accepting bills of exchange, drawn upon them by country and foreign bankers and others, for whom they act as agents, such bills being drawn *bonâ fide* in the usual course of such agency.

The opinion of the judges was this day delivered by

TINDAL, C. J. My lords, the facts stated by your lordships as the groundwork of the questions proposed to her majesty's judges, are these:—

The London Joint-stock Bank, under circumstances which would have made it illegal in them as a company, and a violation of the rights and privileges of the Bank of England, to have accepted and issued the bills hereinafter mentioned, if drawn upon them, enter into an agreement with a bank in Canada to procure bills drawn by such bank upon George Pollard, the manager of the London Joint-stock Bank, to be accepted by the said George Pollard, and to provide funds for the due payment of such bills, the money transactions arising therefrom being, in the accounts between the two banks, to be treated in all respects as transactions between the said two banks.

And the first question proposed by your lordships on this state of facts, is,—Whether the acceptance of such bills by the said George Pollard, in execution of this agreement, is lawful, regard being had to the acts in force respecting the Bank of England. And in answer to that question, I beg to state to your lordships, that it is the unanimous opinion of those judges, (b) who heard this case discussed at the bar of

(a) See *Bank of England v. Anderson*, 3 New Cases, 589, (32 E. C. L. R. 262;) 4 Scott, 50.

(b) Tindal, C. J., Bosanquet, J., Coltman, J., Maule, J., Littledale, J., Patteson, J., Coleridge, J., Williams, J., Parke, B., Gurney, B., Rolfe, B.

your lordship's House, that, assuming, according to the terms of that question, that the acceptance of such bills by the London Joint-stock Bank, if drawn directly on that company, would have been illegal, and a violation of the rights and privileges of the Bank of England, it appears to us to be a necessary consequence, that the procurement by the London Bank, that bills drawn upon George Pollard, their manager, shall be accepted by the said George Pollard, under the agreement above stated for the providing of funds for the due payment of such bills, must equally be a violation of the rights and privileges of the Bank of England, upon the principle, that whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.

The exclusive privileges conferred on the Bank of England by parliament, are founded on a contract between that body and the public, for the original grant; and also for the renewal and confirmation of such privileges, the Bank of England has, from time to time, paid very large sums of money to the public; and no member of that public can justify either doing or procuring to be done, any act which, for the protection of such rights and privileges, has been forbidden by law. Now, it is impossible not to see that the substantial parties to the transaction stated by your lordships, are the Canada Bank, and the London Joint-stock Bank; and that the manager of the London Bank, who lends his name, is a mere nominal acceptor, whose name is used to cover the real transaction. It is the London Bank, not the manager, who is to pay the bill, and the Canada Bank engages to remit funds for that purpose before the bill becomes due. By means of this transaction the London Bank takes upon itself the duty of an acceptor, that is, to pay the bill, not in default of the nominal acceptor, but, in the first instance, in consideration of an arrangement, that funds shall be remitted by the Canada Bank (the drawers) for that purpose, to them, the London Bank. The plain object and intent of the various statutes which have been passed for the protection of the Bank of England is, that the funds of a joint-stock banking company shall not be pledged for the payment of a bill issued within a limited distance from London, and having less than six months to run. Such a pledge, given by the acceptance of a bill by such a company, has already been decided by the case of the *Bank of England v. Anderson*, 3 New Cases, 583, (32 E. C. L. R. 262;) 4 Scott, 50, to be a violation of the rights and privileges of the Bank of England. But if the bill be accepted by a servant or nominee of the banking company, and they contract with the drawer that the company will pay it, their funds are bound for the payment, and the bill is circulated upon their credit, not upon that of their servant or nominee. For it is impossible to suppose for a moment, that bills accepted in such form and under such circumstances can be circulated in London upon the individual credit of the nominal acceptor, or upon any other credit than that of the banking company, by whose procurement and direction, and for whose benefit the acceptance is really given. The consequence of such a transaction is, that a competition is necessarily created between a paper currency circulating upon the credit of the banking company, and the paper issued by the Bank of England, which is the very mischief intended to be prevented; for it is obvious, that if the transaction is legal with respect to a bill at less than six months, it is equally so with respect to a bill at six days, or even at a shorter period.

It is contended, on the part of the London Joint-stock Bank, that they are authorized to take any course with impunity which does not fall directly within the precise terms and letter of the prohibitory clauses contained in the several acts which secure the privileges of the Bank of England. It is to be recollected, however, that the clauses protecting those privileges are not merely prohibitory laws. The privilege granted to the Bank of England by parliament, is a positive right conferred upon that body for a valuable consideration, which the law will no more permit to be infringed by third persons without responsibility, than it will a monopoly granted by letters patent under the statute of James I. If, therefore, the acceptance of a bill by the London Bank would be an infringement of such privilege, it cannot be less an infringement, if attended with the same injurious consequences to the Bank of England, to procure another person to accept the bill for the benefit of the London Bank, though such acceptance be made in the name of their appointed nominee whom they are bound to indemnify.

My lords, the second question proposed by your lordships, upon the above statement of facts, is this,—Whether the acceptance of such bills would be lawful, assuming that the London Joint-stock Bank, at the time of such acceptances, had funds in their hands on account of the bank in Canada, equal to the amount of the bills so accepted. And if the answer given to the first question be correct, the acceptance by a person procured for that purpose by the London Joint-stock Bank, must be considered in the same light as if the acceptance had been made by the banking company in its own name; and, if that be so, the answer to the second question will be found in the opinion given by the Court of Common Pleas to the Master of the Rolls upon a case stated to that Court, and confirmed by that noble and learned judge in the case of *The Bank of England v. Anderson*. The opinion of the Court of Common Pleas upon this point was thus expressed: "The relation of debtor and creditor, created by the acceptance of the bill, appears to be considered by the legislature as equivalent to the actual borrowing of the money owed on the one hand, and credited on the other." And the Master of the Rolls, when reviewing the opinion of the Court of Common Pleas, says, "*From the time of borrowing*, means, from the time of owing the money on the bills or notes referred to, or in the case now under consideration, from the time of the acceptance." This case of *The Bank of England v. Anderson* was very fully argued, and was much considered, both in the Court of Law and in the Court of Equity. From the latter court an appeal might have been made to your lordships' House; such an appeal, indeed, is said to have been at first made, but afterwards abandoned, and the decision of the Court of Law and Equity was thereby acquiesced in. The authority of this case was not disputed in the argument at your lordships' bar upon the present occasion, and we see no reason to doubt the propriety of the opinion therein expressed.

My lords, the third question proposed is this,—Would the acceptance of such bills be lawful, assuming that the London Joint-stock Bank had not, at the time of such acceptances, any funds in hand belonging to the Bank in Canada, but that such bills were accepted on the credit of a contract by such bank, to remit sufficient funds to the London Joint-stock Bank to meet such acceptances before the time at which the bills would become payable? And, notwithstanding the difference in the

state of facts adverted to in this question, it appears to us the answer we must give to it is the same as that which we have already given to the second question.

If a bill be accepted upon the undertaking of the drawer to supply funds for the payment of it, a mutual contract, of lending on the one hand, and borrowing on the other, is thereby created; and although the drawer may not fulfil his engagement by actually remitting the amount agreed upon before the acceptance, or even before the day on which the bill becomes due, the transaction is not the less a transaction of lending and borrowing the amount of the money represented by the bill, which transaction takes effect as "a borrowing upon the bill" as soon as the bill is accepted. If, therefore, the bill be drawn (under such an engagement as above mentioned) payable at less than six months from the date, it must necessarily be considered as a bill payable at less than six months from the borrowing of the money.

It is manifest that the introduction into the acts of the word "borrowing," instead of "date," to express the time of the currency of the bill, was only resorted to for the purpose of preventing the issue of bills appearing to be drawn at longer periods than six months from the date, but in fact issued at periods when the bill would fall due within a shorter time than six months from the issuing of them. And it is to be observed that bills or notes payable *on demand* are prohibited absolutely, without reference to any transaction of borrowing, upon which they may have been issued. The word "borrowing" is only employed with respect to bills and notes payable at a future time, in order to designate the period from which the six months are to be reckoned. A "borrowing" is assumed to exist as soon as the banking company begins to owe the money specified in the bill or note, that is, as soon as the acceptance or the note is put in circulation; and the expression "borrowing" is not used as descriptive of the consideration upon which the debt contracted by the bill or note is founded, but to denote the time from which the six months is to begin to run.

My lords, the last question proposed to us is this,—Could the Bank of England maintain any action against the London Joint-stock Bank, founded upon such transactions, under either of the states of circumstances above supposed? And in answer to this question, we are of opinion that an action might be maintained in either case.

It has already been observed, in answer to your lordships' first question, that the exclusive privilege secured to the Bank of England by parliament, is in the nature of a right granted to them by contract for valuable consideration. In the possession of such right, they are entitled to be protected, and any infringement of such right is a private injury to that body, for which they are enabled to seek redress by action at law. Whether the right so granted be directly assailed by an act of the London bank in its own name, or through the medium and intervention of another person acting at their request, and by their procurement, and for their benefit, if they do or cause to be done in effect (though under cover of doing something different) that which is forbidden to be done by the acts passed for the purpose of securing to the Bank of England the right which they have contracted for, such banking company is, in our opinion, liable to be sued in an action on the case for an infringement of those rights.

In an action for the infringement of patent rights, it is of constant

recurrence that the gravamen is laid, not as a direct infringement, but as something amounting to a colourable evasion of the right secured to the party; and we think that the acts of the London Joint-stock Bank described in the foregoing question put by your lordships do amount to an infringement of the rights and privileges of the Bank of England.

LORD CHANCELLOR. My lords, the magnitude of the interests which are involved in the appeal upon which the lord chief justice has given your lordships the benefit of the unanimous opinion of the learned judges, is such, that I cannot regret that we have had the opinion of the learned judges, although it did not appear to me on the argument that any difficulty likely to arise would have made it necessary to have taken the opinion of the learned judges, assuming that the law, as laid down in the *Bank of England v. Anderson*, is good law, as to which no reasonable doubt can be entertained, and as to which I am very glad to find that the lord chief justice has taken the opportunity of stating the opinion of the learned judges.

There really can be no doubt as to the proper decision of the present question, because, if those rights do belong to the bank, established as they are, and as they are asserted in the case of the *Bank of England v. Anderson*, it is quite impossible that those rights should be permitted to be destroyed by the arrangement which was resorted to in the present case. That appears to be the ground upon which the learned judges seem to have come to the opinion, of which they have now given your lordships the benefit. It is an opinion I entertained from the commencement of the argument; and, under these circumstances, I move your lordships that the order of the Court below be affirmed, with costs.

LORD BROUGHAM. My lords, I entirely agree in my opinion on this case, with my noble and learned friend. Indeed, I must say, as he has stated, that I never have entertained any doubt at all upon this case, and more especially when it is placed upon the footing on which it is here put, that of adopting the case of *The Bank of England v. Anderson*, and applying the principle laid down in that case to the facts of this case; and the facts of this case do not appear to me, any more than to my noble and learned friend or the learned judges, to be different. We must, in future, consider that *The Bank of England v. Anderson*, though originally a decision of only one Court, has now received the sanction of all the learned judges, of whose assistance your lordships have had the benefit in this case, and the affirmance of the judgment in this case is, in fact, an affirmance of the judgment in *The Bank of England v. Anderson*, for the case stands on precisely the same principle.

Order affirmed, with costs.

Earl of MANSFIELD against BLACKBURN, Executor of JOHN BLACKBURN.—p. 426.

Plaintiff demised salt springs to defendant, who was to erect salt works on the premises, and pay a rent in proportion to the number of works erected: defendant covenanted to leave the works in good repair at the end of the term: Held, that iron *salt-pans* placed by defendant on a frame of brick, and used in the boiling of salt, were parcel of such works, and that defendant was not entitled to remove them.

THIS was an action of covenant, tried before VAUGHAN, J., at the Chester summer assizes, 1838. The declaration stated that on the 26th of March, 1798, by indenture then made between B. Langlois and J. Laidlaw (both since deceased) of the first part, the plaintiff of the second part, John Blackburn, deceased, (the defendant's testator,) and one John Blackburn, of Liverpool, of the third part,—[after reciting that by indenture bearing date the 1st of February, 1758, and made between William, Earl of Mansfield, deceased, of the one part, and John Blackburn, of Oxford, Esq., since deceased, and John Blackburn, his son, of the other part, the said William, late Earl of Mansfield, for the considerations therein mentioned, did demise unto the said J. B. and J. B., their executors, administrators, and assigns (amongst other things) a certain close, meadow, or parcel of land, with certain rock salt, mines of rock salt, and springs of brine near Northwich, in the county of Chester; with free liberty, full power and authority to and for them, the said J. B. and J. B., to bore, search, dig, and sink for, get, and take to their own proper use and uses rock salt or salt rock and brine at his and their own wills and pleasures; and for that purpose, on the said demised premises, or any part thereof, to make, dig, or sink any number of rock salt or brine pit or pits, air or water pits, shaft or shafts, or any holes, tunnels, hollows, eyes, drifts, pipes, or cavities for the finding, discovering, getting, and taking of rock salt, salt rock, or brine, in the said demised premises, or any parts thereof; and also free liberty in and upon the said demised premises, or any part thereof, to make, set up, erect, and build, and to use and enjoy any rock salt house or houses, storehouse or storehouses, warehouses or other building, engine or engines, place or places, for the laying and storing, securing, preserving, or keeping rock salt or salt rock, or for making, laying up, storing, securing, preserving, or keeping of white salt, as they or either of them should think proper; and also free liberty to build or erect any kay or kays as therein mentioned: to have and to hold the said liberties unto the said J. B. and J. B., parties thereto, their executors, administrators, and assigns, from the 25th of March then next, for the term of forty years: in which said indenture of lease the said William, late Earl of Mansfield, did, for himself, his heirs, and assigns, covenant, promise, and agree to and with the said J. B. and J. B., parties thereto, their executors, administrators, and assigns, that he, the said William, Earl of Mansfield, his heirs and assigns, should and would, within the space of one month after the expiration of the term thereby demised, at the request, costs, and charges of the same J. B. and J. B., or either of them, their or either of their executors, administrators, or assigns, seal and duly execute a new lease of the said demised premises and privileges, and of all the works, pits, kays, buildings, and engines to be by them erected and made on the same premises, unto the said J. B. and J. B., or either of them, their or either of their executors or administrators, for the further term of forty years, to commence from the expiration of the term thereby demised: and after further reciting that the said William, late Earl of Mansfield, died in the year of our Lord, 1793,]—the said B. Langlois and J. Laidlaw, and also the plaintiff did, and each and every of them did, demise unto the said J. B. deceased, and J. B. of Liverpool, parties to the indenture first above mentioned, their executors, administrators, and assigns, the said close, meadow, or parcel of land, with the hill thereto adjoining, and the appurtenances thereunto belonging, comprised

in the said indenture of lease secondly above mentioned, and all and every the messuages, dwelling-houses, wick-houses, salt-houses, erections, buildings, pits, eyes, shafts, tunnels, and other matters and things since made at, in, upon, or under the said premises thereby demised for the use and convenience of carrying on the said salt trade, with free liberty, power, and authority to and for them, their executors, administrators, and assigns, or any of them, their agents, servants, or workmen in the said meadow or parcel of land and hill thereto adjoining, or any part thereof, in such manner and by such ways and means as they the same J. B. deceased, and J. B. of Liverpool, their executors, administrators, and assigns, or any of them, should from time to time think proper, during the term of forty years therein mentioned, to bore, search, dig, and sink for, get, and take to their own proper use and uses, rock salt or salt rock and brine at their wills and pleasures; and for that purpose, in the said thereby demised meadow or parcel of land and hill thereto adjoining, or any part of either of them, to make, dig, or sink, or cause to be made, dug, or sunk, any number of rock salt or brine pit or pits, air or water pits, shaft or shafts, or any holes, tunnels, hollows, eyes, drifts, pipes, or cavities for the finding, discovering, getting and taking of rock salt, salt rock, or brine, in the said meadow or parcel of land and hill thereto adjoining, thereby demised, or any part thereof, when they or either of them, their or either of their executors, administrators, or assigns should from time to time think proper; and there to get and take all such rock salt, or salt rock as should be there found or gotten, and from the brine springs there discovered to make white salt, and the same when so found and gotten, to take, dispose of, and convert to their own proper use, benefit, and advantage; and also free liberty in and upon the said meadow or parcel of land and hill thereto adjoining, thereby demised, or any part thereof, to make, set up, erect and build, or cause to be made, set up, erected and built, and to use and enjoy any rock salt-house, store-house or store-houses, ware-houses or other buildings, engine or engines, place or places for the laying and storing, securing, preserving, or keeping rock salt, or salt rock, or for the making, laying up, storing, securing, preserving, or keeping of white salt, as they or either of them should think proper; and, amongst other liberties, free liberty to build a kay or kays, or other conveniences upon the river as therein mentioned: to have and to hold the said meadow or parcel of land and hill thereto adjoining, liberty of making rock salt or salt rock pits, air or water pits, brine pits, or other works, and of getting and taking rock salt, or salt rock and brine in the said thereby demised premises, and all other the liberties, privileges, and premises whatsoever intended to be thereby demised, with their and every of their appurtenances, subject as aforesaid, unto the said J. B. deceased, and J. B. of Liverpool, parties thereto, their executors, administrators, and assigns, from the 25th day of March last past before the date of the said indenture first above mentioned, for the term of forty years; subject, nevertheless, to the provisions, conditions, restrictions, and agreements thereafter mentioned concerning the same: yielding and paying yearly and every year during the said term the yearly rent therein mentioned: and the said J. B., deceased, and J. B. of Liverpool, for themselves jointly and severally, and for their joint and several heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the said B. Langlois and J.

Laidlaw, their heirs and assigns, and also, to and with the plaintiff and his assigns, and such other person or persons as for the time being should be entitled to the reversion immediately expectant on the determination of the term intended by the said indenture to be granted of or in the said tenements and premises, and to and with every of them, that they, the said J. B., deceased, and J. B. of Liverpool, parties thereto, their executors, administrators, and assigns, or some of them, should and would from time to time, and at all times thereafter during the said term thereby demised, pay unto the said B. Langlois and J. Laidlaw, their heirs and assigns, or the said plaintiff and his assigns, and such other person or persons as aforesaid, the yearly rent of 8*l.*; and also the yearly rent or sum of 7*l.* 10*s.* over and above the said yearly rent of 8*l.* thereinbefore reserved, without any deduction, defalcation, or abatement whatsoever, for each and every *salt pan* which then already had been, or thereafter during the term thereby demised, should be erected or set up on the demised premises, or any part thereof, or be used for the making of white salt; and further, that they, the said J. B., deceased, and J. B. of Liverpool, parties thereto, their executors, administrators, and assigns, should and would from time to time, and at all times during the term thereby demised, at their own costs and charges, keep and maintain all and every the building and buildings, kay and kays, *work and works*, then standing and being upon the said premises, or any part thereof, and all and every such other edifices and engines as should be at any time during the said term thereby granted, erected, set up, built, or made in or upon the said demised premises, or any part thereof, in good and sufficient repair and condition; and at the end or other sooner determination of the said term, should *and would yield and deliver up all and every the said premises mentioned to be thereby demised, and all such buildings, kays, works, edifices, and engines* in good and sufficient repair and condition, unto the said B. Langlois and J. Laidlaw, their heirs or assigns, or the said plaintiff or his assigns, or such other person or persons as, for the time being, should be entitled to the reversion immediately expectant on the determination of the term intended by the said indenture to be granted of or in the said tenements and premises, in a quiet and peaceable manner.

The declaration then averred that the said John Blackburne, deceased, and John Blackburne of Liverpool, both died during the said term granted by the indenture first above mentioned,—the said J. B., deceased, having survived the said J. B. of Liverpool,—and alleged the following breaches; that the said J. B. of Liverpool, and J. B., deceased, during their joint lives, and the said J. B., deceased, after the death of the said J. B. of Liverpool, and the defendant as executor as aforesaid, since the death of the said J. B., deceased, did not during the said term at their own costs and charges, keep or maintain all and every the building and buildings, and kay and kays, work and works standing and being upon the said premises or any part thereof as aforesaid, and all and every other such edifices and engines as had at any time during the said term been erected, set up, built, or made, in or upon the said demised premises, or any part thereof, in good and sufficient repair and condition; nor did they or any of them at the determination of the said term, yield or deliver up *all and every the said premises thereby demised, and all such buildings, kays, works.*

edifices, and engines in good and sufficient repair and condition unto the said B. Langlois and J. Laidlaw, their heirs or assigns, or to the plaintiff or his assigns, or such other person or persons as should be entitled as aforesaid, in a quiet and peaceable manner, according to the form and effect of the said indenture in that behalf; but suffered and permitted the said buildings, kays, works, edifices, and engines to be and continue, and the same were for and during all that time ruinous, prostrate, fallen down, and in great decay for want of keeping and maintaining the same in such good and sufficient repair and condition as aforesaid; and also the defendant as such executor as aforesaid at the expiration of the said term, to wit, on the 25th of March, 1838, pulled down, took down, dug up, tore up, and carried away divers of the said buildings, kays, *works*, edifices, and engines, to wit, forty houses, forty out-houses, &c., forty troughs, forty pipes, 400 yards of troughs, 400 yards of pipes, &c., &c., ninety *salt pans*, &c., &c.

The defendant pleaded as to the alleged breach in the pulling down, taking down, tearing up, and carrying away of the said buildings, kays, works, edifices, and engines in the declaration mentioned, that he the defendant, as such executor as aforesaid, did not at the expiration of the said term, pull down, take down, dig up, tear up, or carry away the said buildings, kays, works, edifices, and engines, or any or either of them in manner and form as the plaintiff had in that behalf alleged: on which issue was joined.

And as to the other breaches in the declaration alleged, the defendant pleaded payment into court of the sum of 275*l.*; to which the plaintiff replied, that he had sustained damages to a greater amount; on which also issue was joined.

At the trial it appeared that the two leases set forth in the declaration were granted on the several days, and by and to the several parties therein mentioned.

After the grant of the lease of the 1st of February, 1758, and before the grant of the lease of 26th of March, 1798, the lessees erected on the premises, divers ware-houses, stove-houses, store-houses, pan-houses; reservoirs, kays, an engine-house with a steam-engine, dwelling-houses and cottages, and other permanent buildings; and sunk a brine pit or shaft, into which a pump was inserted; they also set up ten salt-pans, each within a pan-house, which pans, being subject to great wear and tear, from time to time they renewed, and repaired by cutting out the worn parts and putting in new plates: they also laid down a quantity of pipes and troughs. The pans, pipes, and troughs continued in the same positions in which they were respectively erected and laid down until they were removed by the defendant as hereinafter mentioned. The salt-pans were composed of plates of iron, and were about twenty-six-feet long by twenty-six feet wide, and rested by their own weight, without any fastenings, upon low brick walls, in the sides of which were iron fire-hatches or bars, within which were the fires by which the pans were heated. The pans had rings on their sides by which they were lifted off to be repaired. The pipes and troughs were conduits for conveying the brine to the various salt-pans. The engine worked the pump which raised the brine out of the brine-shaft into open troughs or spouts of wood, elevated on wooden tressells at a height of several feet, whence the brine ran down into a large cistern or reservoir outside the gates of the works, from which a main pipe of wood was laid under ground

(the upper part thereof being only a few inches below the surface of the ground) into the area or open space of ground within the gates of the works; and from this main pipe, branch pipes of wood were laid, at some places above, and at others a little below the surface of the ground, through holes in the walls of the pan-houses, to each salt-pan. Two other salt-pans of the same kind, and constructed in the same manner, were erected about twelve years ago by the lessees under the lease of 1798.

Shortly before the determination of the lease of 1798, the defendant, as executor of the surviving lessee, removed the twelve salt-pans, the pump, with its trees and rods, the fire-hatches, and all the troughs and pipes above described, excepting such as were laid within and under the buildings. They could be got at, but were left because they were not worth the trouble and expense of removing. The pans could not be got out without pulling down part of the gable end of the pan-houses, which was accordingly done in each pan-house; and the damage thus occasioned to such pan-houses was included in the plaintiff's particular of breaches. The earth disturbed by the removal of the underground pipes was replaced. The defendant only took away the articles before enumerated, leaving the steam-engine, cisterns, landing cranes, stages, pan-houses, reservoirs, and every other erection and building characterized by the term salt-works.

The value of the salt-pans was agreed to be 1033*l.*; and of the pump, fire-hatches, troughs, and pipes, 150*l.*

At the trial, the jury found the first issue for the plaintiff, with 1183*l.* damages for the value of the articles carried away; and they found the second issue for the defendant; the learned judge who tried the cause giving leave to move to enter the verdict on the first issue for the defendant, if the Court should be of opinion that the articles which had been carried away did not fall within the meaning of the covenant or which the action was brought.

A motion was subsequently made on the part of the defendant, pursuant to the leave reserved by the learned judge, to enter a verdict for the defendant on the first issue; and on the part of the plaintiff, pursuant to like leave, that in the event of the damages on the first issue being reduced by the Court, the verdict for the defendant on the second issue should be set aside, and a verdict should be entered for the plaintiff on that issue for the amount of such reduction; upon which motions rule *nisi* were granted.

Evans, on moving for the rule to enter a verdict for the defendant, contended that these pans were chattels, not affixed to the freehold, and that they did not fall within the description of salt *works* which the defendant had covenanted not to remove.

Under the original lease the lessee was to construct the salt-works, and then to set up the pans, and pay an additional rent for the works in proportion to the number of pans set up: the pans were not mentioned in the clauses of demise, or in the covenant to leave in repair; and, according to the practice of the salt counties, a lessee who should propose to take salt-works, would not expect to find them provided with pans. It was said in *Lawton v. Salmon*, 1 H. Bl. 259 n, that "a salt *work* consists of buildings, &c., for the purpose of containing the pans," thereby distinguishing the works from the pans: in that case, indeed, as between heir and executor, the pan was held to be affixed to

the freehold, and to belong to the heir; here the question was between lessor and lessee, and turned only on the meaning to be put on the word *works* in the lessee's covenant: but in *Lawton v. Lawton*, 3 Atk. 13, it was held that a fire-engine, set up for the benefit of a colliery by a tenant for life, should be considered as part of his personal estate, and therefore should go the executor, for the increase of assets in favour of creditors; and in *Naylor v. Collinge*, 1 Taunt. 19, it was held, that though a covenant, by a tenant, to yield up in repair, at the expiration of his lease, all buildings which should be erected during the term upon the demised premises, included buildings erected, and used by the tenant, for the purpose of trade and manufacture, if such buildings were let into the soil, or otherwise fixed to the freehold, yet, that it did not include them where, as in the present case, they rested upon blocks or pattens.

Wilde, Serjt., and *E. V. Williams*, who showed cause in Trinity term, 1839, argued, that the salt *works* necessarily included the pans, as the works would be incomplete, and the brine-spring useless, without such pans; that the lessor in the first lease had contemplated the erection of such pans; in the second lease had described them as existing; and, therefore, must be considered as having demised them under the general description of *works*. They were not specified in the covenant to leave in repair, because the word *works* sufficiently comprehended them, and an enumeration of particulars is always pregnant with risk of litigation.

Naylor v. Collinge only decided that certain articles, there the subject of dispute, were not fixtures; and *Martyr v. Bradley*, 9 Bingh. 24, (23 E. C. L. R. 249,) that in the lease of a mill, millstones would not pass under the word *improvements*. The question here was as to the meaning of the defendant's covenant; and as ten of the pans, at least, were taken under the last lease of the salt-works, they must be considered to form a part of those works as much as sails part of a windmill.

Evans and *Welsby* were heard in support of the rule.

Cur. adv. vult.

TINDAL, C. J. This was an action of covenant brought to recover damages for the breach of the covenant contained in a renewed lease of certain salt-works, whereby the lessees covenanted to keep and maintain in good and sufficient repair, "the buildings, kays, and works then standing and being on the premises, and all and every other such edifices and engines as should be at any time during the term erected, set up, built, or made in or upon the demised premises," and at the determination of the term to deliver up "all the premises mentioned to be thereby demised, and all such buildings, kays, works, edifices, and engines in good and complete repair and condition."

The breach stated in the declaration was as well for not keeping in repair, as for not delivering up in such good repair, at the determination of the term, the buildings, kays, works, edifices, and engines, but on the contrary, at the determination of the term, carrying away from the premises divers articles and things enumerated in the declaration.

The defendant, as to the pulling down and carrying away the articles enumerated, pleaded "that he, the defendant, did not, at the expiration of the said term, pull down, take down, dig up, tear up, or carry away the said buildings, kays, works, edifices, and engines, or any or either of them, in manner and form, &c."

And as to the residue of the breach of covenant, that is, as to the non-repair of the premises, the defendant paid money into court, averring that the plaintiff had not sustained any damages beyond the sum so paid in. At the trial the jury found the first issue for the plaintiff, with damages for the value of the articles carried away; and they found the second issue for the defendant; the learned judge who tried the cause giving leave to move to enter the verdict on the first issue for the defendant, if the Court should be of opinion that the articles which had been carried away by the tenant did not fall within the meaning of the covenant on which the action was brought.

The articles, for the removal of which the action was brought, consisted of certain salt-pans, in which the brine was manufactured into salt, and also certain pipes, by which the brine was brought from the salt-spring into the brine-pits; the salt-pans being made of plates of iron, supported upon brickwork, and having rings on their sides, by which they were lifted off to be repaired; the pipes being metal pipes, partly carried under ground, and partly along troughs supported by tressels. No real distinction, however, appears to us to arise between the salt-pans and the pipes, as to the application of the law which we conceive to apply to the present case.

If this had been the ordinary case between landlord and tenant, as to the right of the latter to remove fixtures, or other things erected on the premises, at the end of the term, we should have entertained no doubt but that the salt-pans had been removable by the tenant, as well from the nature and description of their annexation to the freehold, as upon the doctrine laid down by Lord MANSFIELD, in *Lawton v. Salmon*. 1 H. Bl. 259, in note, "that it would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt-works: he might very well have said, 'I leave the estate no worse than I found it.' That would be for the encouragement and convenience of trade, and the benefit of the estate."

But the question before us does not turn upon any general rule of law, but upon the interpretation of a positive contract into which the parties have entered with each other; and the point we have to determine is, whether, under that contract, it was the intention of both parties that the salt-pans should be left at the determination of the term, or that the tenant should have the power to remove them.

The lease in question is a lease granted in 1798, under a covenant to renew, contained in a former lease of 1758, such former lease being recited in the renewed lease, and also set forth in the declaration. The former or original lease was a demise of a close, meadow, or parcel of land, and hill, and the rock salt, mines of rock salt, and springs of brine in the same, with all the particular liberties enumerated in the lease, for the purpose of establishing salt-works, and making salt for sale; "and all such other liberties and privileges as were usually enjoyed by the proprietors of rock salt pits, or brine pits in or near Northwich, in the county of Chester." And it appears from that lease that it was granted before the first erection or creation of the salt-works, which were to be made and completed by the tenants under the powers given by such lease. It further contains a covenant on the part of the lessors, within one month after the expiration thereof, to execute a new lease of the said demised premises and privileges, "and of all the works, pits, kays, buildings, and engines, to be by them erected and made on the

same premises;" importing, therefore, that the renewed lease should be a lease of such salt-works as at the date of the renewal might have been erected, made, and worked under the former lease. The original lease then contains a covenant to pay, amongst other rents, "an additional rent of 7*l.* 10*s.* for every salt-pan which, during such further term, should be erected, worked, or made use of by the said tenants for the making of white salt."

Now, that a salt-pan is part of the works necessary for the making of white salt from brine appears from the lease itself to have been well understood by both the contracting parties; it was so essential a part that it forms the basis of the calculation of the rent to be paid by the tenant; and further, this salt-pan is by the lease itself described to be "erected, worked, and made use of by the tenants in making salt."

The renewed lease, after reciting the former lease, recites also the fact that the lessees "had erected and set up divers engines, machines, roads, and other conveniences, as well for the use and the convenience as for the managing and carrying on, at, in, or upon the said demised premises, the trade or business of rock salt or salt rock getters and refiners, or manufacturers of white salt;" and after this recital, contains a demise to the defendant's testator and the other lessee, not only of the close, meadow, or parcel of land, and hill, as in the original lease, but also a demise of "all and every the messuages, dwelling-houses, wick-houses, *salt-works, erections, buildings, and other matters and things since made, at, in, or upon or under the said demised premises for the use and convenience of carrying on the said demised trades.*"

And under this demise of the salt-works and other things as they were then carrying on, we think must be included all that was erected and set up on the premises that was essentially necessary to constitute a *salt-work*, and that such description must include salt-pans, without which the trade of a manufacturer of brine salt could not be carried on at all, and which salt-pans, it is to be observed, are by the very terms of the lease described to be "erected and set up." The language of the lessee's covenant for payment of the additional rent of 7*l.* 10*s.*, is in this respect clear and unambiguous; it is, "for each and every salt-pan which already hath been, or hereafter during the term hereby demised shall be *erected or set up on the said demised premises, or used for the making of white salt.*"

The legal construction of the words of demise in the renewed lease being, therefore, sufficient, as we think they are, to comprise the salt-pans, "then erected or set up on the premises," as a necessary and constituent part of the salt-works, we think the construction of the covenant to yield and deliver up, at the end of the term, "all and every the premises demised," must be equally large and comprehensive, and must be held to include the salt-pans, without which the salt-works demised have lost their character and use, and must cease to be salt-works altogether.

It has been urged in argument, that as the term "salt-pans" occurs so repeatedly in the lease, the inference is, that the parties would have mentioned them specifically by name in the covenant to leave things on the premises if they had been intended to be comprised within it: but we think the answer given at the bar is sufficient, that the parties might avoid the expression of this particular article, from the apprehension that any others which were necessary to constitute a salt-work might be excluded, because not enumerated.

Looking, therefore, to the legal construction of the covenant, we think it comprises the salt-pans, as a thing erected or set up on the premises, and which is at the same time, essential to the existence of the salt-works demised, and consequently that the rule for setting aside the verdict on the first issue, and entering it for the defendant, must be discharged. The cross rule obtained by the plaintiff, which has now become unnecessary, must at the same time be also discharged.

Rules discharged.

MEDLEY and Others against PRITCHARD and Another.—p. 442

The Commissioners of Sewers having obstructed a watercourse which plaintiff claimed a right to navigate, made him an offer of compensation, which he refused, and sued for more: Defendants, by their pleas, denied the right, and also the obstruction: after abortive attempts during four years to proceed with reference of the action, the Court refused the commissioners leave to plead a third plea, which would defeat the action, unless the commissioners renewed, and the plaintiff refused, the offer of compensation made at first.

THE defendants, contractors employed by the Commissioners of Sewers, having, under the direction of the commissioners, obstructed a watercourse which the plaintiffs had been accustomed to navigate with their barges, the commissioners in April, 1835, offered the plaintiffs the sum of 1696*l.* 13*s.* 1*d.* as a compensation for the injury sustained by them in consequence of the obstruction of the watercourse: the plaintiffs refused this offer, and under an arrangement with the commissioners brought this action against the contractors for the purpose of trying the plaintiffs' right to a larger compensation.

The declaration alleged the plaintiffs' right to the use of the watercourse as incidental to their possession of a close on the side of it, and complained of certain sluices erected by the defendants.

The attorneys for the commissioners conducted the case on the part of the defendants, who, by their pleas, denied having caused any obstruction, and traversed the right as alleged in the declaration.

In August, 1835, the commissioners, by a judge's order, submitted the decision of this action under a special case, to the award of a bar-rister.

The matter lingered on in abortive attempts to proceed with the reference, till Trinity term, 1839, when, upon an affidavit on the part of the commissioners, that some imposition had been practised in the year 1808 on their predecessors, by the predecessors of the plaintiffs, touching the right to the navigation of the watercourse in question, and that from unforeseen circumstances it had become impossible to proceed with the reference,

Wilde, Serjt., obtained a rule *nisi* for the defendants to be allowed to set aside the Judge's order of August, 1835, and to add a plea under the Statute of Sewers, 23 H. 8, c. 5, which would defeat the plaintiffs' claim.

Sir *F. Pollock* and *Butt*, who showed cause against the rule in the same term, contended that after the offer of amends made by the commissioners, and the length of time that had elapsed, it would be an improper exercise of the discretion of the Court to allow the defendants to plead a plea which would at once defeat the action. There was no allegation that the offer which the commissioners had made was disadvantageous to the public; and in *Cox v. Rolt*, 2 Wils. 253, the Court

refused to permit the defendant to withdraw his pleas of the general issue and to plead the same plea again, and to add the plea of the Statute of Limitations. In *Jenkins v. Creech*, 4 Dowl. 293, where, to an action on a check, the defendant pleaded but one plea, which admitted the making the check, the Court refused to permit him also to plead that the check required a stamp. So in *MDowall v. Lyster*, 2 Mees. & Welsb. 52, in an action on a banker's check, the Court refused leave to add a plea, (the time for pleading having expired,) that it was drawn by the defendant more than fifteen miles from the place where it was made payable, and falsely dated, in contravention of the 9 G. 4, c. 49, s. 15.

Wilde and *Ogle*, in support of the rule, relied on the circumstance that the plaintiffs had refused the tender; that the commissioners had made their offer in ignorance of the advantage obtained from their predecessors, by the predecessors of the plaintiffs in 1808; and that in acceding to a reference, the commissioners had not waived any legal defence they might have.

Cur. adv. vult.

TINDAL, C. J. The application made on the part of the defendants to amend their pleas by the introduction of a new plea, which would furnish an answer to the plaintiffs' ground of action, after so long an interval since the pleas were put upon the record, is an application to the discretion of the Court, and ought not to be acceded to by the Court, unless the equitable consideration of the whole case, as it stands between the parties, calls for such determination.

Now, it appears by the affidavit of Mr. Hodgson, that on the 3d of April, 1835, a tender of the sum of 1696*l.* 13*s.* 1*d.* was made by the commissioners as a compensation for the injuries sustained by the plaintiffs in consequence of the alteration of the sewer, which tender was declined by the plaintiffs: and it appears further, that this action was brought against the contractors, by arrangement with the Commissioners of Sewers, for the mere purpose of trying the plaintiffs' right to a larger compensation. On the part of the commissioners it is alleged, that such tender having been refused, they are remitted to any defence they might originally have to the plaintiffs' right to recover any compensation whatever; and that in the arrangement for bringing the action, and submitting its decision under a special case, and reference, they never intended to waive any legal defence they might have. But we think the pleas put upon the record by the solicitors of the commissioners, who conduct the case for the defendants, appear to support the view taken of the arrangement by the plaintiffs.

Then, facts are stated in the affidavits on the part of the commissioners, from which an argument was raised and strongly insisted on before us, that there had been some imposition practised on the Commissioners of Sewers for the time being, with reference to the original arrangement in 1808. But, admitting such dealing to have taken place, there is not the slightest ground to surmise that the present plaintiffs, who claim as purchasers from the former owner, of whom mention is made in the argument, had any share in it whatever; and we think it would be unjust to the plaintiffs that their rights to the ordinary course of proceeding in this action should be affected on the present point by the wrongful acts, if such there were, of their predecessors.

Taking all the circumstances into consideration, it appears to us to be reasonable and equitable on the one hand that the commissioners should not be entitled to the favour they ask of the Court, unless they are ready to abide by the tender made by them before the action was

brought; and we therefore think, if the commissioners refuse to abide by the terms proposed by themselves, so much of the rule as seeks to discharge the order of Mr. Baron ALDERSON should be made absolute, and the rest discharged; and the commissioners should be held to try the cause on the pleadings as they now stand. But

If, on the other hand, the commissioners are now willing to abide by their original offer, and the plaintiffs decline to accept it, then the defendants should be allowed to amend their pleas, by the introduction of the new plea, and the rule be made absolute.

And we think, as the parties throughout the early stage of the proceedings appear to have been endeavouring to carry into effect an arrangement which has at last proved abortive, without blame on either side, there should be no costs of this motion on either side.

Judgment accordingly.

IN THE EXCHEQUER CHAMBER.

(In Error.)

FEARNLEY v. WRIGHT and Others, Assignees of ROSS, a Bankrupt.(a)—p. 446.

A bankrupt having, within two months before the *fiat*, deposited chattels by way of pledge, in consideration of an advance of money: Held, that the transaction, though *bona fide*, and without notice of an act of bankruptcy, was not protected by sect. 82 of 6 G. 4. c. 16, and that the assignees might recover *in trover*.

To *trover* for goods the defendant below pleaded that after Ross became bankrupt, and before the date and issuing of the *fiat* against him, to wit, on, &c., he delivered to and deposited with the defendant below, the goods and chattels in the declaration mentioned, in consideration of and upon certain large advances of money amounting to 2000*l.*, then made and advanced by the defendant below to the said Ross at his request, upon the delivery and the deposit of the said goods and chattels with the defendant below, to secure payment to the said defendant of such advances thereon: that the goods and chattels were delivered to and deposited with the defendant below, and the advances were made by him thereon *bona fide*, and without any notice to the defendant below so dealing with Ross, of any prior act of bankruptcy, or any act of bankruptcy committed by Ross at the time of the defendant below so dealing with him: and because the advances so made by the defendant below had always since been, and still were, unpaid and owing to the defendant below, he, at the said time when, &c., detained the said goods and chattels to secure the repayment of such sums of money by him advanced on the deposit, with him, of the said goods and chattels; as he lawfully might for the cause aforesaid; which was the said supposed conversion in the declaration mentioned; and that, the defendant below was ready to verify, &c.

The plaintiffs below replied, that the advances in the plea mentioned were made by the defendant below to Ross after he became bankrupt, and within two calendar months before the issuing of the *fiat* against him, under which the plaintiffs below were assignees; and that, the plaintiffs below were ready to verify.

(a) This case ought to have been printed among the cases of Trinity term, but was unavoidably postponed.

The defendant below rejoined, that Ross did not, nor did the plaintiffs below, at any time tender or offer to pay to the defendant below, the said advances of money in the plea mentioned, or any part thereof, and the same remained and were wholly unsatisfied and unpaid to the defendant below; and that, the defendant below was ready to verify.

Demurrer and joinder.

Judgment having been given for the plaintiffs below in the Court of Common Pleas, Michaelmas term, 1838, (a) a writ of error was brought, and the case was argued again in the Exchequer Chamber in Trinity vacation 1839, by

Hoggins, for the defendant below. He contended, as before, that the delivery of the bankrupt's goods in exchange for the defendant's money was, in effect, a payment protected by the eighty-second section of 6 G. 4, c. 16, for when such is the agreement of the parties dealing, payment may as well be made by money's worth as by money. He relied on *Willis v. The Bank of England*, 4 Adol. & Ell. 21, (31 E. C. L. R.,) *Woodbridge v. Swann*, 4 B. & Adol. 633, (24 E. C. L. R.,) and *Shaw v. Batley*, 4 B. & Adol. 801, and referred to *Dixon v. Purse*, Peake's Addit. Cases, 187, *Ex parte Prescott*, 1 Atk. 230, *Olive v. Smith*, 5 Taunt. 60, (1 E. C. L. R.,) and *Ex parte Deeze*, 1 Atk. 128, to show the extent to which *bona fide* dealings had been protected from the effect of relation to the act of bankruptcy.

Cannan v. Denew, 10 Bingh. 292, (25 E. C. L. R.,) he distinguished, on the ground that there, the goods were not deposited with the party who advanced the money, as in the present case, but were allowed to remain in the possession of the bankrupt; so that there was not a *bona fide* transfer.

Tomlinson, for the plaintiffs below, relied on *Cannan v. Denew*, where an assignment of goods by one who had committed a secret act of bankruptcy, as a security for money advanced by the defendant, was held unavailable against a commission issued within two months after the assignment. Such an assignment or transfer of goods was not a *payment*, but a mere security for a loan: the transferee would have had only a lien on the goods, and not an absolute property in them: in the case of payment, the money or thing paid became the absolute property of the party receiving it. In *Willis v. The Bank of England*, *Woodbridge v. Swann*, and *Shaw v. Batley*, there was an actual payment by moneys numbered.

Hoggins was heard in reply.

Cur. adv. vult.

PARKE, B. The question raised by the pleadings in this case was, whether a loan of money to a bankrupt on the security of a deposit of goods made by him after a secret act of bankruptcy, and within two months before the date of the fiat, was protected by the eighty-second section of the 6 G. 4, c. 16, so as to render the security valid. The Court of Common Pleas were of opinion that the loan was not a payment with the intent of that clause; and we concur in that opinion.

It appears from a review of the provisions of the different bankrupt statutes to have been the intention of the legislature to diminish more and more the severe effect of the relation to the act of bankruptcy, and to extend the protection given to *bona fide* transactions; but yet they do not appear to have reached this case by any statutes in force at the time the transaction occurred. The 1 Jac. 1, c. 15, s. 14, was expressly confined to the case of a payment by a debtor to the bankrupt, who is

(a) See 5 New Cases, 89, (35 E. C. L. R.)

not to be endangered by payment of his debt to a bankrupt before such time as he shall understand or know that he has become so; it is by way of provision on the previous section giving the commissioners power to assign to the creditors debts due to the bankrupt; and, in effect, prevents the creditors recovering such debts as have been paid. The 46 G. 3, c. 135, s. 1, protects, amongst other dealings, all payments to bankrupts made after an act of bankruptcy, and more than two months before the commission, if the person so dealing with the bankrupt had no notice of an act of bankruptcy, or insolvency, or stoppage of payment. In this section the term "payment" must be used in a sense different from that of payment of a debt contracted previously to an act of bankruptcy, inasmuch as such a payment was already protected by 1 Jac. 1, c. 15, though made within the two months. The 5 Geo. 4, c. 98, for consolidating the bankrupt law, repeals all prior statutes. The seventy-eighth section protects, amongst other dealings, *all payments* by a bankrupt made more than two months before the commission; notwithstanding a prior act of bankruptcy, unless with notice of it. The seventy-ninth section protects *all payments to a creditor*, though made within the two months; and the eighty-first section provides an indemnity for all payments by debtors, and puts the delivery of personal estate held for a bankrupt on the footing of a debt. Under this act of parliament, no payment to a bankrupt, except that which would have been payment of a debt under the 1 Jac. 1, c. 15, would have been protected. Then came the statute 6 G. 4, c. 16, which repeals all former statutes relating to bankrupts. The eighty-first section *omits* payments made by or to bankrupts amongst the transactions rendered valid if made more than two months before the fiat; and the first part of the eighty-second section protects payments by a bankrupt *to a creditor* only. The second part, on which the question arises, enacts, that all payments made to a bankrupt after an act of bankruptcy, not by debtors specifically, but by any one, shall be deemed valid, provided that the person so dealing with the bankrupt had not, at the time of making such payment, notice of any act of bankruptcy.

Adverting to the language of this clause, and comparing it with that of 1 Jac. 1, c. 15, there is no doubt that the term "payments" means to include something more than the mere discharge of an existing debt, due from a debtor before the bankruptcy.

On the other hand there is as little doubt that it must mean payments which, but for this clause, would be invalid, and would be counted as nothing, and leave the person paying exposed to a claim by the assignees of the bankrupt. Payments made by a debtor to the bankrupt after an act of bankruptcy, in respect of a debt due before such act, are strictly within the clause; so one would have supposed would payments made by a person having money belonging to the bankrupt in his hands; yet that case is expressly provided for by a subsequent section, the eighty-fourth. Probably this clause of the eighty-second section was intended to include ready money payments for goods, which had indeed substantially been held to be within the 1 Jac. 1, in the case of *Cash v. Young*, 2 B. & C. 413, (9 E. C. L. R.); in which case, however, it should be observed, that there was a short interval between the taking away of the goods purchased and the payment for them, so that the purchaser *at the time of payment* might well be considered a debtor to somebody. And accordingly the Court of King's Bench, in *Hill v. Farnell*, 9 B. & C. 45, (17 E. C. L. R.,) held that a ready money payment for goods

was within the clause in question. It is difficult to see what other payments were contemplated by the legislature in framing this section. A loan of money, if it can be called a payment at all, taken by itself, and without reference to any security being given, is plainly not within the meaning of the section; for such loan, made after an act of bankruptcy of which the lender had no notice, is rendered valid by the forty-seventh section of this same act, to the extent of enabling the lender to prove under the fiat; and it cannot be pretended that the eighty-second section, if it applies to a loan of money at all, can, where no security has been given, do more than make it a provable debt. Can the giving security make any difference? The nature of the transaction is not thereby altered, the loan is a loan still, and nothing else; it is a provable debt under the forty-seventh section; and whether the security can be held or not, must depend, not on the eighty-second section, which has no words relating to *dealings* and *transactions*, but on the eighty-first, which has.

A case was put in argument of a supposed consignment of goods before an act of bankruptcy, on a contract that the consignee should advance two-thirds of the value; the commission of a secret act of bankruptcy by the consignor, and subsequent advances of money by the consignee, in ignorance of the act of bankruptcy and within two months of the issuing of a fiat. Doubtless this would be a payment within the eighty-second section of the act—it would not be made by a debtor, and it would be, in truth, a loan; yet, being made in compliance with a previous binding contract, it would be within the spirit and the words of the act. If the consignee had refused to make it, an action for a breach of contract would have lain against him by the consignor, supposing him not to have committed any act of bankruptcy.

The supposed case illustrates the meaning of the word "payment" in the section in question: and upon the whole we are of opinion that it means either payment of an antecedent debt, or of a debt contracted at the time when such payment is made; or a payment made in pursuance of a contract antecedent to the act of bankruptcy; or, at all events, some parting with money, or money's worth, which, when once made, could not be recovered back.—We are therefore of opinion that the court below was right in holding that it does not extend to a voluntary loan of money, and that judgment must be

Affirmed.

IN THE HOUSE OF LORDS.

(In Error.)

GWYNNE against BURNELL and MERCERON. (a)—p. 453.

G., as surety for A. B., who was appointed a collector for the year 1828, executed a bond, with a condition that A. B. should "well and truly pay or cause to be paid unto the Receiver-General of the taxes, &c., all such sum and sums of money as should come to the hands of the said A. B., as such collector, upon the days and at the times by the acts (43 G. 3, c. 99, and 3 G. 4, c. 88) appointed for the payment thereof, and according to the true intent and meaning of the said acts.

(a) This case should have been inserted among the decisions of Trinity vacation, but was unavoidably postponed.

In an action against G. on this bond, he pleaded that, before the commencement of the action, A. B. was possessed of and entitled to divers *lands, goods, and chattels*, of great value, to wit, &c., as of his own property, and within the jurisdiction of the commissioners, *of which the plaintiffs had notice*, and which said lands, goods, and chattels were subject and liable to be seized and sold, and might have been seized and sold, in pursuance and by virtue of the directions and powers given to the commissioners by the statute, for the purpose of satisfying and paying such sum and sums of money assessed and collected by A. B., and detained or not duly paid by him in pursuance of the direction of the statutes, but which lands, goods, and chattels remained unsold by the commissioners. The replication to this plea stated that A. B. had no *lands* within the jurisdiction of the said commissioners which they could seize and sell, *of which the plaintiffs had notice*; and that all the *goods and chattels* of A. B., within the jurisdiction of the commissioners and *of which the plaintiffs had notice*, were seized and sold in pursuance of the directions and powers given to the commissioners in that behalf. The defendant rejoined, that A. B. had *lands* within the jurisdiction of the commissioners which *they could have seized and sold*, and that *all the goods and chattels* of A. B., *which could have been discovered and found* by the commissioners within their jurisdiction, were not seized and sold.

By a special verdict it was found that A. B. had paid over to the Receiver-General all the sums received by him for assessments for the year 1828, but that he did not pay all those sums to the service of that year, 693*l.*, part thereof, having been paid to the account or service of former years, during which he had also been collector, but during which the defendant had not been his surety. It was further found that A. B. had, *after his default*, *lands or houses* of the value of 121*l.*, and also *goods* of the value of 200*l.*, which could have been seized and sold by the commissioners; that the commissioners had *not notice* that A. B. was possessed of any houses, lands, or goods, at the time of default; but that they had reasonable grounds for believing that he possessed household goods at that time of the value of 200*l.*, which might have been seized and sold:—Held,

First, that payment by A. B. of moneys collected by him to the account of former years was a breach of the condition of the bond.

Secondly, that seizure and sale of lands and goods of A. B., of the existence of which the commissioners *had notice or knowledge*, was, under 43 G. 3, c. 99, s. 9, a condition precedent to their right to put the bond in suit against the surety. Parke, B., *dis.*

Thirdly, that seizure and sale of lands and goods of A. B., of the existence of which the commissioners had no notice or knowledge, was *not* a condition precedent to their right to put the bond in suit against the surety. Per Littledale, J., Vaughan, J., Parke, B., Bosanquet, J., Williams, J., and Coltman, J. *Contrà*, Lord Brougham, Patteson, J., Gurney, B., and Coleridge, J.

Fourthly, that the defendant was entitled to a *verdict* on the issue (supposing any issue could be said to be raised thereby) arising on the rejoinder to the replication of the above plea; but not to judgment thereon.

Fifthly, that the plaintiffs were not entitled to judgment *non obstante veredicto* on the issue arising out of the fifth plea, on any supposed implied admission in the rejoinder that the plaintiffs had no notice of the existence of the lands and goods in question.

Sixthly, that a Court of Error cannot award a repleader. Vaughan, J., and Williams, J., *jud.*

By the 43 G. 3, c. 99, s. 9, the commissssioners of taxes are directed to appoint assessors, a part of whose duty it is to “return the names of two or more able and sufficient persons, within the bounds or limits of those parishes for which they shall be assessors respectively, to the said commissioners to be by them appointed collectors of the several duties to be raised and assessed by them as such commissioners.”

By sect. 13, it is enacted, that “such persons as shall be presented to the said commissioners to be collectors shall, if required so to do, give good and sufficient security to any two or more of such commissioners, equal to the amount of the whole duty to be collected in each district or place, for their duly paying such moneys assessed as aforesaid as shall come to their hands, and for their duly demanding the sums assessed of the respective persons from whom the same are payable, and, in case of non-payment thereof, their duly enforcing the powers of the act against such as make default; which security the said commissioners, or any two or more of them, are thereby authorized and empowered to take, by a joint and several bond, with two sureties at

the least, to and in the names of any two or more of such commissioners, in such penal sum as aforesaid, with a condition thereto to the effect before mentioned: and every such bond given by way of such security as aforesaid shall be prosecuted by such commissioners on any failure or default of the said collector or collectors: provided always, *that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector or collectors, in pursuance and by virtue of the directions and powers given to the respective commissioners by this act.*"

These directions and powers are defined by sect. 52, which enacts, that, "if any such collector or collectors shall neglect or refuse to pay any sum or sums of money which shall be by him or them received as aforesaid, as in and by this act is directed, [to the Receiver-General, sect. 48,] and shall detain in his or their hands any money received by them or any of them, and not pay the same at such time as by the act is directed, or shall have wilfully refused to give an account to the commissioners of the sums by him or them collected in manner before directed, the said commissioners, or any two or more of them, are *"authorized and empowered to imprison the person, and seize and secure the estate, as well freehold as copyhold, and all other estate, both real and personal, of such collector or collectors to him or them belonging, or which shall descend or come into the hands or possession of his or their heirs, executors, or administrators, wheresoever the same can be discovered and found;"* and the commissioners, who shall so seize and secure the estate, shall and are thereby empowered to appoint a time for a meeting of the commissioners; and the commissioners present at such meeting, or the major part of them, in case the accounts of such collector be not duly delivered, or the moneys detained by him be not paid, "shall and are thereby empowered and *required* to sell and dispose of all such estates which shall be for the cause aforesaid seized and secured, or any part of them, to satisfy and pay into the hands of the Receiver-General the sum that shall not be so accounted for, or shall be so detained in the hands of such collector or collectors, their heirs, executors, or administrators respectively, together with the reasonable costs and charges of recovering, raising, and paying the same, which costs and charges shall be ascertained and settled by the said commissioners, and the overplus, if any, shall be restored to the person who owned the estate before the sale thereof."

Gwynne, the defendant below, had entered into a bond as surety for a tax collector. In an action on this bond, judgment had been given against Gwynne in the Court of Common Pleas, (a) and, on error, in the Exchequer Chamber, 2 Scott, 16; and the cause having been thence carried to the House of the Lords,

The following questions were proposed for the opinion of the judges:

1. A bond is given by a defendant as surety for A. B., a collector of assessed taxes for the parish of D., in the county of E., for the year 1828, to the commissioners of the assessed taxes, with a condition to the following effect:—"That, if the above-bounden A. B. do and shall well and faithfully demand and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same shall or may be payable, and shall and

(a) See 9 Bingh. 544, (23 E. C. L. R. 375.)

do, in case of non-payment thereof, duly enforce the powers of the said acts against such persons who may make default therein, and also well and truly pay or cause to be paid unto the Receiver-General of the said taxes, rates, and duties for the said county of E. all such sum and sums of money as shall come to the hands of the said A. B. as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts, and also do and shall when thereunto required, at such times and places as shall be appointed for that purpose, give and render, or cause to be given and rendered unto the commissioners appointed or to be appointed to put the said acts in execution, or to any two of them, a just and true account in writing of all such sum and sums of money which he the said A. B. shall have collected and received by virtue or on account of the said assessments, and shall forthwith pay and deliver the same unto the said commissioners, or any two of them, or unto such person or persons whom they or any two or more of them shall appoint, then this obligation to be void, or else to remain in full force and effect."

A. B. paid to the Receiver-General of the taxes for the said county all the sums of money collected and received by him, and which came to his hands as collector for the year 1828, at the proper days and times mentioned in the condition and appointed by the acts of parliament (43 G. 3, c. 99, and 3 G. 4, c. 88) for payment thereof; he did not pay all those sums, however, but a part of them only, to the account or service of that year, and the residue he paid to the account or service of former years for which he had been collector; but for those former years defendant had not been surety for the said A. B.; and by such payment the account of former years was paid up and satisfied.—Was this conduct of A. B. a breach of the condition of the bond?

2. A. B. had, after the time of such breach, (supposing that a breach took place,) certain lands and goods in the district, and within the jurisdiction of the said commissioners, of which the commissioners had knowledge, before an action was brought on the bond. An action having been brought—is it a defence to that action that the commissioners did not, before suit, seize and sell the said lands and goods?

3. Is it a defence to such action that the commissioners did not seize and sell, supposing that the commissioners had no knowledge before the commencement of the suit of the existence of such lands or goods?

4. To an action on such a bond, a plea was pleaded, to which there was a replication and rejoinder as follows:—

Plea—that A. B. did from time to time, and at all times from and after the making of the said writing obligatory, and the said condition thereof, well and faithfully demand and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same were payable long before the exhibiting of the bill of the plaintiffs in that behalf, to wit, on the 5th of April, 1829: that from that time continually hitherto, A. B. was possessed of and entitled to divers lands, goods, and chattels of great value, &c., as of his own property, and within the jurisdiction of the commissioners appointed for putting in execution the said acts of parliament in the said writing obligatory mentioned, to wit, at, &c., *of which the plaintiffs during all that time there had notice*; which said lands, goods, and chattels were during all that time subject and liable to be seized and sold, and might during all that time have been seized and

sold for divers large sums of money, in pursuance and by virtue of the directions and powers given to the commissioners in that behalf by the said several acts of parliament in that case made and provided, for the purpose of satisfying and paying such sum and sums of money assessed and collected in the said division of A. B. as such collector as aforesaid, and detained or not duly paid by A. B. in pursuance of the directions of the said statutes in the said writing obligatory mentioned; but which said lands, goods, and chattels had hitherto continued unsold by the said commissioners, within the jurisdiction of the said commissioners, &c. Verification.

The replication,—after protesting that A. B. did not, from time to time, and at all times from and after the making of the said writing obligatory and the said condition thereof, well and faithfully demand and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same were payable, as in the said plea in that behalf was alleged, but was guilty of neglect and omissions in that behalf—alleged that, after A. B. had collected and received several sums of money, and had neglected and omitted to pay unto the Receiver-General of the said taxes, rates, and assessments for the county the moneys so by him collected and received, to wit, on, &c., the said A. B. *had no lands* within the jurisdiction of the said commissioners which they could seize and sell, *of which they the plaintiffs had notice*; and that all the goods and chattels of A. B. within the jurisdiction of the commissioners, and of which the plaintiffs had notice, were seized and sold in pursuance of the directions and powers given to the commissioners in that behalf, &c., for the purpose of satisfying such sum and sums of money assessed and collected in the said division of A. B. as such collector as aforesaid, by A. B. as such collector, and retained and not duly paid and accounted for in pursuance of the directions of the said statutes in the writing obligatory mentioned, but that the same on such sale produced only 20*l.*, which was applied to and towards the satisfaction and payment of the sum and sums of money assessed and collected in the said division of A. B. as aforesaid, and detained and not duly paid and accounted for by him in pursuance of the directions of the statutes in the said writing obligatory mentioned, but was insufficient to satisfy and discharge the same, and there still remained a large sum of money, of the moneys so collected and received by A. B., detained and not accounted for, wholly unpaid to the Receiver-General of the said taxes, &c., and kept and retained, or otherwise converted and disposed of, by A. B. to his own use; and that *there were not*, at any time after such seizure hitherto, *any other goods or chattels of A. B. within the jurisdiction of the commissioners, of which the plaintiffs had notice*, subject and liable to be seized, or taken, or sold in pursuance and by virtue of the directions and powers given to the commissioners in that behalf by the said acts of parliament in that case made and provided, or any of them, for the purpose of paying and satisfying the said part of the said sum and sums of money assessed and collected by A. B. as such collector as aforesaid, and so remaining unpaid and detained and not accounted for as aforesaid. Verification.

Rejoinder—that, after the said supposed collection and receipt of the said several sums of money in the replication mentioned by A. B., and his supposed omission and neglect to pay the same unto the Receiver-

General, A. B. *had divers lands within the jurisdiction of the said commissioners which they could and might have seized and sold*, and that, after the said supposed collection and the said supposed omission and neglect of A. B. as aforesaid, *all the goods and chattels which were of the said A. B. at the time of such omission and neglect as aforesaid, and which could, and might, and ought to have been discovered and found by the commissioners*, within the jurisdiction of the said commissioners, *were not seized and sold* in pursuance of the directions and powers given to the commissioners by the statute, in manner and form as the plaintiffs had above in that behalf alleged;—concluding to the country. Similiter.

The jury found that there were lands and goods of A. B. within the jurisdiction after the default and before the commencement of the suit, but that the commissioners had not notice thereof:—Ought the issue raised by the rejoinder to have been found for the plaintiff or the defendant?

5. Supposing the verdict to be entered for the defendant on the said issue, and supposing it not to be a defence to the action that the lands and goods of A. B. were not sold by the commissioners unless they had notice (meaning knowledge) of their existence—Can the verdict be entered for the plaintiffs *non obstante veredicto*, on the implied confession in the rejoinder that, if there were lands and goods, &c., the commissioners (the plaintiffs) had no notice of their existence?

6. Supposing the judgment cannot be so entered, and the issue raised by the said rejoinder be immaterial—Can a Court of Error award a repleader, and ought it to do so in this case?

7. Supposing a Court of Error cannot or do not award a repleader, what judgment ought it to pronounce? Ought it to be a judgment for the plaintiffs on the whole record, on the ground that the other pleas or the issues found thereon, contain a sufficient confession or afford sufficient proof whereon to found a judgment for the plaintiffs, disregarding the immaterial issue?

The case was argued on the 27th and 28th of June, 1837, by Sir *W. Follett*, for the defendant below, and by *Wightman* for the plaintiffs below.

For the defendant below it was submitted that the judgment for the plaintiffs below ought to be reversed—

First, because the jury having found that the collector paid all the moneys that came to his hands, as collector, to the Receiver-General, that was a sufficient payment under the condition of the bond.

Secondly, because the lands or houses which the jury had found the collector possessed, ought to have been sold by the commissioners as a condition precedent to their commencing the action, by the 43 G. 3, c. 99.

Thirdly, because the household goods which the jury had found that the collector possessed ought to have been sold by the commissioners, as a condition precedent to their bringing this action, by the 43 G. 3, c. 99.

The plaintiffs below submitted that the judgment of the Exchequer Chamber ought to be affirmed—

Because, among other reasons, the 43 G. 3, c. 161, s. 81, appoints particular days for the payment by collectors of moneys received by them to the Receiver-General, viz., within twenty days after the respective days appointed for payment of the duties by the parties assessed to the collector, which are fixed by the twenty-third section of the same

act; and it was found by the special verdict that the collector did well and truly pay to the Receiver-General all moneys collected by him, upon the days and at the times by the acts appointed, but that he did not pay all those sums to the service of the year for which he had been so appointed such collector, as in the said condition was mentioned.

Also, because the misapplication by the collector of moneys received on account of the year for which the defendant below was surety to a former year's account was not a payment in discharge of the condition of the bond, or, at all events, not unless it had appeared that the plaintiffs below had knowledge of the misapplication, which was not the fact, and was not found by the special verdict.

Further, because the seizure of the collector's lands or goods was not a condition precedent to putting the bond in suit, or, at all events, not unless the fact of possession was known to the commissioners at the time of commencing the action, which was negated by the special verdict.

There being a difference of opinion amongst the learned judges who were present at the argument, (a) they, on the 4th July, 1839, delivered their opinions *seriatim*, as follows:—

COLTMAN, J. 1. The first question proposed by your lordships in this case does not appear to me to be doubtful. The condition of the bond is, (amongst other things,) that the collector shall well and truly pay to the Receiver-General all such sums of money as shall come to the hands of the said collector, on account of taxes, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts. Now, the moneys in question, not having been paid to the service or account of that year in respect of which they had been assessed, but in payment of what must for this purpose be considered as the private debt of the collector, cannot, I think, be considered as having been paid according to the true intent and meaning of the acts. The condition of the bond, therefore, has been broken, and the bond forfeited.

2. To the second question proposed by your lordships, it ought, I think, to be answered, that the defence suggested would be a valid defence to an action brought against the surety. The question turns upon the proviso in the thirteenth section of the 43 G. 3, c. 99, construed with reference to the fifty-second section of the same act. In stating the opinion I have formed, I speak with all deference for those who may differ from me on this and other points. But it seems to me that, unless it is held that the commissioners are bound to exert legal diligence against the principal before suing the surety, the surety will be deprived of the benefit which the act intended to give him. The statute (s. 52) gives power to the commissioners to seize and sell the whole real and personal estate of the collector making default. It is obvious that the exercise of this power may be, and is likely to be highly advantageous to the surety; and I conceive that the intention of the act was, to give the surety the benefit in the first instance of this process, instead of compelling him to pay the whole amount of the arrears, and leaving him to seek for his indemnification by an action at law, or other more circuitous course, against his principal, at the risk of being defeated by accident or chicanery. This construction appears to me to be also most agreeable to the natural and obvious meaning of the words made

(a) Littledale, J., Vaughan, J., Parke, B., Bosanquet, J., Patteson, J., Gurney, B., Williams, J. Coleridge, J., and Coltman, J.

use of in the proviso, and to be the sense in which any ordinary person about to enter into a contract of suretiship would understand them. By putting a refined and artificial sense on the expressions, and by construing them otherwise than as the party contracting would be likely to understand them, we should be making the act of parliament a snare to those who might bind themselves as sureties upon the faith of its provisions.

3. To the third question proposed, it should, I think, be answered, that it is no defence to the supposed action, that the commissioners did not seize and sell lands of the existence of which they had no knowledge before the commencement of the suit.

By the statute 43 G. 3, c. 99, s. 13, it is provided that no bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, &c., of such collector, in pursuance and by virtue of the directions and powers given to the commissioners by that act. The question thereupon for consideration is, what the lands are which are to be sold under the directions and powers given by the fifty-second section of the act. By that section, the commissioners in their respective jurisdictions are authorized and empowered to seize and secure the estate, real and personal, of the collector, to him belonging, or which shall descend to his heirs, executors, or administrators, wheresoever the same can be discovered and found. Now, although the word "wheresoever" is an adverb of place, and its proper sense should seem here to be, in what place or in what hands soever; yet, taking the whole sentence together, it obviously implies that the collector may have property which cannot be discovered by the commissioners. And when the section goes on to direct the commissioners to sell and dispose of all *such estates* as shall be for the cause aforesaid seized and secured, it seems to me that, by necessary implication, the words "such estates" must be construed to mean such estates as the commissioners shall have discovered, for they cannot have seized and secured any others. This construction seems to me to be called for by considerations of public convenience, and to be in no wise unjust towards the surety, who may reasonably be expected, and from a regard to his own interest will naturally take care, to inform the commissioners of any property belonging to his principal which can be discovered.

I cannot but look upon the surety as being in a considerable degree identified with the party for whose acts he has undertaken to be responsible, and at least as having much better means of knowledge as to his circumstances than the commissioners; and, if the surety is not able to discover the concealed property of his principal, it seems to me unreasonable to expect that the commissioners shall do it.

4. To the fourth question, the answer, I think, ought to be, that the issue raised by the rejoinder must be deemed to have been found for the defendant.

To clear the way for the consideration of this question, it is necessary to state with particularity the substance of the pleadings. The plea alleges three matters of substance—first, that the collector was possessed of divers lands and goods which were subject and liable to be seized and sold, and might have been seized and sold:—secondly, that the plaintiffs had notice of this:—thirdly, that the lands and goods had not been sold. The replication alleges that the collector had not any lands, of which the plaintiffs had notice, and that some of his goods had been

seized and sold, and that there were no other goods belonging to him within the jurisdiction, of which the plaintiffs had notice. The rejoinder is, that the collector had divers lands which the commissioners could and might have seized and sold, and that all the goods of the collector which could, and might, and ought to have been discovered were not seized and sold, in manner and form as the plaintiffs had alleged, and thereof the defendant put himself upon the country.

Now, in the allegations of this rejoinder, as it seems to me, no assertion of notice to the plaintiffs is involved. That it is not asserted in express terms is clear; and I see no reason to think that the defendant intended to involve it. On the contrary, he appears to have omitted it designedly, and to have inserted what seems intended as a substitution for the allegation of notice, when he avers that the goods could, and might, and ought to have been discovered. I cannot, therefore, see any ground for extending the sense of the issue tendered beyond what the words naturally import. Taking this to be the effect of the rejoinder, it cannot but occur to ask whether any issue at all is joined; for the rejoinder contains nothing contradictory to the allegations in the replication: on the contrary, the two are entirely consistent. To make an issue regularly, there should be an affirmative on one side and a negative on the other, meeting each other directly; and various cases are to be found in our lawbooks in which, for a neglect of this rule, it has been held that no issue had been joined, and that the defect was not aided after verdict, but that the verdict was a nullity: see *Sandback v. Turvey*, Cro. Jac. 585; *Oxford v. Rivett*, Cro. Car. 79. 93, Het. 33. 60; *Derby v. Hemming*, Cro. Car. 593; *Kirle v. Lees*, 3 Leon. 66. There are other cases, however, in which the same strictness has not been observed, and in which, after one party has made an allegation and offered to go to the country upon it, and thereupon the similiter has been added, and a trial had, it has been considered as an agreement by both parties to go to trial upon that allegation, and an informal mode of joining issue upon it, which, as far as that informality is concerned, is aided, after verdict, by the statute 32 H. 8, c. 30: see the cases of *Walthall v. Aldrich*, Cro. Jac. 588; *Parker v. Taylor*, Cro. Car. 316; *Burton v. Chapman*, Sid. 241, 2 Keble, 278. 280. It is difficult to reconcile these two classes of cases with each other; but it appears to me reasonable to adhere to the latter class, and to hold that where the parties have, by going to the country on a particular point, agreed to treat it as an issue joined, it should be considered, after verdict, as being such, though informally joined. The result is that the parties in this case are to be deemed to have joined issue upon the allegations contained in the rejoinder, that rejoinder not importing any allegation of notice. I consider, therefore, the issue as being in substance only this—whether the collector had any lands and goods which were not seized and sold. The rejoinder in terms says, in addition, that the lands might have been seized and sold, and that the goods could, and might, and ought to have been discovered. But it does not appear to me that, under these terms, any separate issuable matter of fact is asserted, or that by the insertion of them the nature of the issue is changed: for, when it is said that the lands could and might have been seized and sold, it is but the statement of a conclusion resulting necessarily from the existence of the lands; and, when it is said that the goods could and might have been discovered, the assertion, standing nakedly as it does, is but the assertion of

a possibility which necessarily results from the fact of their existence. When it is alleged that the goods ought to have been discovered, that is not an allegation of a fact to be proved, but of a legal obligation supposed to result from the facts alleged. Considering, therefore, the only fact in issue to be, whether the collector had lands and goods not sold before the action brought, and it being found by the verdict that he had, I think that the issue raised on the plea set out, is found for the defendant.

But, although the informal mode in which the issue is joined is, I think, cured, after verdict, by the statute, there is another defect in the issue which is not aided by the statute, namely, its immateriality: for notwithstanding some early cases to the contrary, it is now well settled, that a verdict, though it may cure an informal, cannot cure an immaterial issue. The verdict, therefore, though found for the defendant, cannot give him any title to a judgment in his favour. The case is the same, if the true view of the pleadings is that no issue at all is joined: for, in that case, the verdict is to be considered as a nullity as far as the plea in question is concerned, and consequently the defendant cannot be entitled to judgment upon it. *Sandback v. Turvey*.

5. To your lordships' fifth question, it ought, I think, to be answered that judgment cannot be entered for the plaintiffs, *non obstante veredicto*, on the implied confession in the rejoinder that the plaintiffs had no notice of the existence of the lands and goods in question. The ground on which such a judgment may be given is explained by Lord Holt in *Staples v. Heydon*, 2 Lord Raym. 924; 6 Mod. 10; 2 Salk. 579; 3 Salk. 121, where he is reported, in substance, to have said, "Where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, there, in such a case, judgment shall be given upon the confession, without regard to the finding upon an immaterial issue: But, where the matter of the justification is such a matter as, if it were well pleaded, would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action. And the books do, all of them, if they be narrowly looked into, turn upon this difference—where the confession is full, and the matter of the plea is ill in substance." And the form of entering up the judgment is quite consistent with the principles here laid down by Lord Holt: see Viner's Abridgment, *Judgment*, (D,) pl. 1; *Broadbent v. Wilkes*. The present case does not fall within the rule so laid down; for the defendant's plea, if true in point of fact, is a valid defence to the action: and no instance can be found in which judgment has been given *non obstante veredicto*, except where the plea pleaded by the defendant has been insufficient in point of law.

But it is said that the Court must consider it as established upon this record, that one of the material allegations of the plea, viz., that of notice to the plaintiffs, is not true; for, the replication asserts that the collector had not any lands of which the plaintiffs had notice, nor any goods of which they had notice, but those sold; and the rejoinder, by not re-asserting the notice, must be considered as having admitted its non-existence, and consequently the record must be taken as if the plea had not contained any allegation of notice, in which case it would have been insufficient in law. Now, although it should be conceded that, upon the trial of the issue raised, the want of notice must be considered as admitted, it would not follow that, when the issue is found to be im-

material, and the question arises whether there ought to be a repleader or a judgment *non obstante veredicto*, the non-existence of notice is to be considered as an established fact. The case seems rather to range itself in the class of those in which the defendant may have failed through mispleading, rather than through an inherent defect in the substance of his defence. He may have mistaken the law, and selected the wrong fact to put in issue; but, if a repleader were awarded, he might, for any thing the Court can see, succeed in establishing the plea originally put forward as the ground of his defence.

But it may be urged that, in the case supposed in your lordships' question, the finding of the jury has established the non-existence of notice. To this the answer is, that the finding in question is of a matter not within the compass of the issue: and the Court, I conceive, cannot pay any regard to a finding by the jury which has no tendency to decide the issues raised by the pleadings; for the jury are sworn only to decide the issues joined, and the parties cannot be supposed to have come prepared to try any thing else. The jury, in the case supposed, have found as a fact that there was *no* notice to the commissioners; but the question, whether there was such notice or not, not having been put in issue, cannot be considered as ever having been tried and judicially determined.

These reasons, combined with the absence of all precedent for pronouncing a judgment *non obstante veredicto*, in a case where a valid and sufficient plea was pleaded in the first instance, have led me to the conclusion that such a judgment cannot be given in the present case.

6. To your lordships' sixth question, the answer is, that a Court of Error cannot award a repleader. In the case of *Holbeck v. Bennett*, 2 Saund. 319, 2 Keb. 769, 689, 825, 2 Lev. 11, it was said by Lord HALE, that, in the King's Bench, on error from the Common Pleas, it was anciently the custom to award a repleader, for which he cited many records; but he said it was obsolete, and not in use in his time, and had not been done for 100 years. Subsequently to this case, it has been commonly received in the law, and it is to be found in many text-writers, that a repleader cannot be awarded by a Court of Error; and I think rightly so; for it is to be observed, that to deny a repleader where it ought to be awarded is error, *Staple v. Heydon*, 6 Mod. 2: and it seems to follow that, if a Court of Error can award a repleader, it would be bound to do so in all cases in which the inferior court ought to have done so. If, then, it were held that Courts of Error have the power to award a repleader, it would follow that they have done wrong in the course they have been pursuing for so many years—a supposition which cannot be admitted under a system of laws professing, as the English code does, to rest mainly upon precedent.

7. To your lordships' seventh question, it should be answered, that, if judgment cannot be entered for the plaintiff, *non obstante veredicto*, and if the Court cannot or do not award a repleader, the judgment given in the court below ought to be reversed, and that judgment cannot be pronounced for the plaintiffs on the whole record, on the ground suggested.

Your lordships' question renders it necessary to consider the doctrine on which the case of *Goodburne v. Bowman*, 9 Bing. 532, (23 E. C. L. R. 369,) 2 M. & Scott, 700, rests, and it will appear on consideration that the present case does not fall within the principle on which that

case, as I understand it, proceeded. The declaration in *Goodburne v Bowman*, was for a libel. The defendant pleaded the general issue and several special pleas, justifying the libel as true. The verdict was for the plaintiff on the general issue, and on one of the pleas of justification; and for the defendant on the other pleas. The plaintiffs applied for judgment *non obstante veredicto*. The Court were of opinion that the special pleas contained a confession of the action, and that the answer set up was insufficient by way of avoidance. But it was observable in that case, that some of the allegations of the declaration were admitted by implication only, and not in express terms; and a doubt might be suggested whether there was a sufficient confession of all the material allegations of the declaration. The Court, therefore, went on to say, (as I understand their meaning,) that even if they were not fully confessed by the special pleas, yet, inasmuch as they were put in issue by the plea of the general issue, and had been proved upon the trial, and a verdict given thereupon, they were as effectually established on record as if directly and in terms confessed; and, the justification being bad in substance, they held that the plaintiff was entitled to judgment on the whole record. But the present case is different. No question is made here, whether there is a sufficient admission of the material allegations contained in the plaintiff's declaration: but the ground on which the plaintiffs are not entitled to judgment is, that the Court cannot see that the avoidance is insufficient, inasmuch as upon an examination of the plea set out, and the issue raised upon it, the Court cannot see sufficient ground for assuming the falsity of the allegation of notice contained in the plea. Now, if it had appeared judicially from any other part of the record that the plaintiffs had had no such notice, the case of *Goodburne v. Bowman* would have furnished a precedent in the plaintiffs' favour. But I see nothing in any other part of the record which can clear up the ambiguity on this point, the finding of the jury respecting notice not being entitled to be considered as a judicial determination on that point, for the reasons adverted to in a former answer.

In this state of the case, it seems to me that the judgment which ought to be pronounced should be simply a judgment of reversal, which will leave it open to the parties litigant to bring a new action, if so advised.

COLERIDGE, J. 1. In answer to the first question propounded by your lordships, I beg to state that, in my opinion, the conduct of A. B., in the case supposed, was a breach of the condition of the bond. Upon this question it will not be necessary to state the reasons for my opinion at any great length. The bond and the condition are framed to secure the due discharge of the duties of the collector in his office: his office is but for a year's duration, and his duty (amongst other things) is to pay to the Receiver-General, at the times specified, the moneys which he shall collect upon the assessments for the year, in discharge of those assessments: to pay them in discharge of the arrears of former assessments is no more such a payment than to pay them on any private account, to the Receiver-General, or to any other person, would be. Whether this were done with or without the participation or collusion of that officer seems to me immaterial. The condition is broken, if, with the knowledge and by the act of the collector, in whole or in part, the moneys collected are not paid in discharge of that assessment under which they were collected.

2. In the case supposed in your lordships' second question, I am of the opinion that it is a defence to the action that the commissioners did not before suit seize and sell the lands and goods there mentioned, if such action be brought against the surety. This seems to me to flow as a necessary and direct consequence from the language of the first proviso in the thirteenth section of the 43 G. 3, c. 99: and I can give no effect to that proviso, which was evidently framed to make a distinction between the principal and surety, in favour of the latter, unless by so construing it. The bond is taken under the provisions of that section; and it seems to me that the proviso is virtually incorporated in the condition of the bond, and that it limits the liability of the surety to the making good the deficiency remaining after sale of the collector's lands and goods. Many reasons in support of this view of the case occur to the mind, and have already been suggested in the printed judgments formerly delivered in the case now before your lordships: (a) but it seems to me more satisfactory to rely on the unambiguous language of the proviso itself. According to that, the surety is made liable to be sued, not for *every* deficiency, but for a particular and limited deficiency, *i. e.* that which shall remain *after* sale of the lands, tenements, goods, and chattels of the collector. That liability only he must be taken to have contemplated when he sealed the bond. To hold that he may be sued *before* sale, for the general deficiency, is to subject him to a different and enlarged liability, and, in effect, to expunge the proviso from the statute.

3. I am equally of opinion that the want of seizure and sale by the commissioners will be an answer to the action, although they had no knowledge before the commencement of the suit of the existence of the lands and goods. This opinion I express with much diffidence, because I have reason to fear that it differs from that entertained by some of my brethren. But I arrive at it upon the same principle that led me to my answer to your lordships' second question—the principle, namely, of collecting the meaning and intention of the statute from the unambiguous expression used, rather than from any notions which I may entertain of what is just or expedient.

Having considered with attention and respect the reasons that have been stated in support of a contrary opinion, I am bound to say that they have not satisfied my mind. The question arises simply on the construction of the proviso in sect. 13, before referred to: in terms it is silent as to notice to the commissioners, or knowledge had by them: the words are—"no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, &c., of such collector, in pursuance and by virtue of the directions and powers given to the commissioners by this act:" and the question is, whether these words are to be understood as if, instead of them, the statute had said—"all lands, &c., of such collector, of the existence whereof, or otherwise, the said commissioners shall have been apprized by the said surety before the commencement of such suit." This is the question: and the test by which I think it ought to be tried is this—whether this addition is a necessary implication from the words already used, in order to give them a sensible meaning and effect. If by this

(a) See *Collins v. Gwynne*, 9 Bingh. 544, (23 E. C. L. R. 375,) 2 M. & Scott, 640
Gwynne v. Burnell, 2 New Cases, 7, (29 E. C. L. R. 228,) 2 Scott, 16.

test I can see that the proposed addition is already necessarily contained, although not expressed in the statute, it is of course not the less cogent because not expressed. But I cannot concede that we are at liberty, upon any ground whatever, to add a new term to the statute. In saying this, I am not unmindful of the dicta to be found in our books, nor of decisions upon old statutes, which seem to warrant a more free dealing with the written law; and, whenever acts of parliament shall again be framed with the generality and conciseness with which the legislature spoke some centuries since, it may be fit to consider the soundness of that principle of interpretation which they involve: but it is enough to say that it is wholly inapplicable to a modern statute, in which the legislature is careful to express all it intends in so many words, that to go beyond their necessary implication is to make, not to interpret, law. The principle, then, on which I rely will not let in the consideration of particular circumstances in each case, or a regard to a greater or less degree of convenience, or more or less complete effect to be given to the presumed intent of the legislature. Nothing, in short, which is founded on what the legislature might better have done, nor *simply* even what the legislature intended; the sole legitimate inquiry is, I conceive, what intention is to be found in the words of the act, expressed or implied: unless by words written or words necessarily implied, and, therefore, virtually written, the intention has been declared, we cannot give effect to it.

Now, that the words are sensible by themselves, as read without any implied addition, nay, that, the proviso being framed confessedly for the benefit of the surety, the absence of the proposed addition will more largely effectuate its general intent, can, I think, scarcely be denied. The argument, indeed, takes another direction—that it is necessary to qualify or restrain the proviso by implying the necessity of knowledge in the commissioners, in order to prevent the words from having their full natural operation, because that would defeat the very object of the section itself. This seems to me avowedly to be an alteration of the statute, and, therefore, I should not feel removed from my position, if I were to concede that the effect of my interpretation would be that which is alleged. I am not, however, driven to such a concession: if the commissioners do their duty, they will, before the appointment of collectors in any of the three modes pointed out by the ninth, thirteenth, and fourteenth sections of the statute, and before the admission of any persons to be sureties, take care to inform themselves of the properties of the collectors, in such a manner as to prevent any practical difficulty arising from the proviso. I observed, in passing, that, though there are three modes of appointment mentioned in the statute, and in one of them the commissioners themselves are the parties to select the collector, yet the same form of condition and the same proviso applies to all;—a circumstance not without its weight in respect of the argument founded on the difference as to the knowledge of the circumstances of the collector, which it is said may be presumed to exist between the commissioners and the sureties.

I do not notice in detail the different suggestions which have been made in favour of the qualified interpretation of the proviso, and which are founded on considerations of inconvenience or liability to fraud in the literal one; because my argument, if a sound one, denies the admissibility of any such considerations. But one argument that has been

used demands an answer. It is said that, the proviso being for the benefit of the surety, justice requires that he should inform the commissioners of those circumstances which bring him within its reach. I own this appears to me to beg the question, or to misrepresent the situation of the parties:—*if* my contract has only been to be answerable for what shall remain after seizure and sale of my principal's property—*if* you cannot sue me for any thing till you have exhausted that primary fund—what principle of justice requires that I should undertake the responsibility of discovering that fund? why am I to help you to the performance of this condition, which is to give you a right of action against myself? If, indeed, it can be shown that I collude with my principal, or take any step to conceal or make away with his property, any presumption may properly be made against me. Something analogous to this, though not expressly in point, is the course of decisions with regard to the landlord's re-entry under the 4 G. 2, c. 28, where no sufficient distress is found on the premises;—the burden of search in every part of the premises, and of proof that no distress was there, is cast on the landlord: but, if the tenant is shown to impede such search in any way, the presumption immediately shifts, and is cast upon the tenant.

I cannot but feel, in conclusion, that the argument on the other side is but a disguised attempt to alter a law which is thought to be imperfectly expressed. To do this is always unjust in the particular case, because it works an *ex post facto* alteration of the contract between the parties, and unsound in legal principle. My sense of the practical importance of this doctrine must be my excuse for having troubled your lordships so long with my answer to the third question.

4. In answer to your lordships' fourth question, I beg to state that, in my opinion, on the facts supposed, the issue raised by the rejoinder ought to be found for the defendant. The allegation and denial of notice in the plea and replication appear to me immaterial; the rejoinder, therefore, rightly passed them over, and tendered the issue on that which was material—on which there has been a sensible finding by the jury.

5. As a judgment, *non obstante veredicto*, is always upon the merits, and assumes, not only that the defence, even if good in form and true in fact, is bad in law, but that it discloses a confession of the plaintiff's case, the hinge upon which the answer to your lordship's fifth question will turn must be, whether the rejoinder, *being by the supposition* (but not in my opinion) bad in point of law, though true in fact, also confesses the remaining allegations of the replication which it has not denied. *In terms*, a pleading of this description, which merely selects for denial one of many facts alleged in the previous pleading, admits nothing as to the residue. For the purpose, indeed, of trial before the jury, every thing is admitted but that which is denied: where, however, the fact so denied and found is immaterial, a distinction has always been taken between a pleading of this sort and one which confesses and avoids. In the case of *Plummer v. Lee*, 2 M. & Welsby, 495, 5 Dowl. 755, the Court of Exchequer acted upon this distinction. The same distinction in principle appears to have been recognised as early as in the case of *Pitts v. Polehampton*, 1 Lord Raym. 390, in which Lord Holt took this difference—that, "where the defendant's plea confesses the duty demanded by the plaintiff, and does not avoid it sufficiently, if the issue be immaterial, and *found for the plaintiff*, he shall have

judgment; but, if the defendant's plea goes in discharge of the action, and the issue is taken immaterially, and verdict for the plaintiff, a repleader shall be granted." I therefore beg to answer this question in the negative.

6. In the case of *Bennet v. Holbeck*, 2 Saund. 319, Lord HALE said that it had even then become obsolete for the Court of King's Bench to award a repleader on a writ of error: and it has ever since, I believe, been the understood practice that a repleader cannot be awarded by a Court of Error. Your lordships are not in possession of the record: and I do not see how you can carry into effect that which judgment of repleader is intended to produce. This judgment directs that the parties replead, and the cause begins again from the point at which the defect in the pleading appears: it is calculated, therefore, to bring them to a material issue in fact or law: and the House would be called upon to perform the functions of an original court for the trial of the cause, without having the record in its possession, or the means of summoning a jury, giving day to the parties, or using any of that machinery by which in the courts below causes are regularly carried on to judgment.

7. Your lordships' seventh question is new. In answering it, I must assume that the opinion which I have ventured to express in answer to your third question is erroneous, and also that, if there had only been the plea in question pleaded, the Court below should have directed the parties to replead. In that state of things, as I have already stated that I think your lordships cannot award that judgment, I see no other course that would have been open for this House, but simply to have reversed the judgment for the plaintiffs pronounced below. The question then arises, whether the fact of there being other pleas and other issues on the record so found that upon them a satisfactory judgment could have been pronounced for the plaintiffs below, if the plea in question had not been pleaded, will enable this House now to pronounce that judgment, although the plea in question be there, and the issue arising on it not disposed of satisfactorily. Upon principle I should have no difficulty in answering this question in the negative. The plea is pleaded to the whole cause of action. In what way a material issue raised upon it may be disposed of, the House cannot at all anticipate judicially: it may be for the defendant below; and, if so, all the other issues become wholly immaterial. To pronounce judgment, then, as to the whole record, in this state of it, is to exclude one party from a defence on which he relies, to prejudge one defence by conclusions drawn from the demerits of other defences. This injustice is prevented by the rule, which I have always considered universal and inflexible, that each plea is to be looked at by itself for all purposes, except where by reference it incorporates any of the allegations of another. If, indeed, the House saw that the issue on any one good plea was in favour of the defendant, the merits of the other pleas might be disregarded. But that is only because they then become immaterial as to the final issue of the cause.

I have stated, that, upon principle, this did not appear to me a difficult question. But I am aware of the case of *Goodburn v. Bowman*, 9 Bingh. 532, (23 E. C. L. R. 369,) 2 M. & Scott, 700; where, in a considered judgment of the Court of Common Pleas, expressions are to be found at variance with the opinion I have expressed. I feel the full weight of that high authority; but I am bound to express to your lordships the opinion which I still entertain; and it is some satisfaction to

me to observe that the principle on which I rely is expressly asserted in the same judgment, and that the departure from it, which I cannot acquiesce in, is not necessary to the decision then made by the Court.

Upon the whole, therefore, my answer to this question is, that, on the supposition made, the judgment below ought to be simply reversed.

WILLIAMS, J. 1. As it so happens, (singularly enough, it seems,) that, upon the first question proposed, there is no difference of opinion, I shall trouble your lordships very shortly in answer to it. I think that the payment of part of the money received by the collector for the year 1828 to the account or service of former years, was a clear breach of the condition of the bond. It seems to me that such application of the money differs in no respect from the payment by the collector of any other debt contracted at any other time and in any other manner.

2. The answer to the second question must depend upon the true construction of the proviso in the 13th section of the 43 G. 3, c. 99. That section, after declaring that collectors, if required, shall find good and sufficient security by bond, in the manner prescribed, has the following proviso:—"That no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector, in pursuance and by virtue of the directions and powers given to the respective commissioners by this act." In considering the true intent and meaning of this proviso, I pass by the opposite inconveniences which have been pressed in argument, by observing that they may probably be considered as balancing each other. Our business, however, is with the construction of the statute: and, if that be ascertained, consequences are to be neglected. And the proper construction is, to give effect to the intention of the legislature as far as possible; and, if there be provisions seemingly inconsistent, to reconcile them so as to further that intention. This, I apprehend, is true generally, and will probably not be doubted. If, however, any authorities be requisite, they may be found in Comyn's Digest, *Parliament*, (R. 10.) Now, that the proviso was introduced expressly for the benefit of the surety, seems to me to admit of no doubt; I can attribute to it no meaning or effect at all, except that be the object. The language seems to me to be perfectly plain and appropriate. The object also is quite consistent with the position of the surety, and his relation to the principal; because there is nothing in the bond in question, or in that relation, to raise an inference that the former should be liable except on failure of the latter. The proviso also is introduced in a manner equally consistent with this view of the subject. In the earlier part of the section, the liability of the surety is described; and then comes the proviso, imposing a restriction upon that liability. Except, therefore, the application of the lands and goods (if any) be deemed a condition precedent to calling upon the surety to make good "the deficiency," no effect is given to the proviso, and it might as well be expunged altogether. Either the proviso does impose this condition, or, in my opinion, it does nothing. I am desirous of bringing before your lordships in as concise a form as possible what occurs to me upon this part of the subject; it has been pursued more fully and in detail (if that should be thought worthy of reference) on a former occasion. (a)

I have before observed that the words of the proviso seem to me

(a) See 2 New Cases, 9, (29 E. C. L. R. 254,) 2 Scott, 26.

plain and unambiguous: they are—"no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, goods," &c., of the collector; that is, no bond shall be put in suit *for the arrears of the collector*, but only for the *deficiency*, if any, after his property has been applied, as in reason and justice it ought, to discharge those arrears, as far as it will go. The distinction seems to me to be obvious and plainly marked between the collector and the surety. By the fifty-second section, (a) which contains the "directions and powers" alluded to in the proviso, the commissioners are authorized and empowered—not *required*—to make sale of the lands and goods of the collector. Against him, therefore, the bond may be put in suit before sale; for he is not within the benefit of the proviso; whereas, that was framed expressly for the protection of the surety, and he, (the latter,) in my opinion, cannot be sued before sale made, if practicable.

When I before observed to your lordships that the language of the proviso seemed to me to be free from doubt, I was not unmindful of the criticism which has been made upon the words "no such bond shall be put in suit," as if they were distinguishable and might have a different meaning from "no action shall be brought," or "no proceedings shall be had or taken." I am, however, unable to perceive any distinction, and cannot but think, that, both in common parlance and in legal acceptance, the terms are identical and have precisely the same meaning. That they would be so understood in a popular sense, I think is beyond a doubt: and that they ought to be so understood legally, I also think. I observe that Lord TENTERDEN, in *Peppin v. Cooper*, 2 B. & Ald. 431, where the question was upon this same act of parliament, uses two of the phrases in exactly the same sense. His lordship, whose general precision and accuracy of expression are well known, observes: "I am clearly of opinion that the bond might be *'put in suit'* without selling the goods of Peppin, who, in this case, was a mere surety; for, although it appears on the face of the bond that he is a collector also, still he is not the collector contemplated by the act, whose goods must be sold

(a) Sect. 52, enacts, "That, if any such collector or collectors shall neglect or refuse to pay any sum or sums of money which shall be by him or them received as aforesaid, as in and by this act is directed, and shall detain in his or their hands any money received by them or any of them, and not pay the same at such time as by this act is directed, or shall have wilfully refused to give an account to such commissioners as aforesaid of the sums by him or them collected in manner before directed, the said respective commissioners, or any two or more of them, in their respective jurisdiction, are hereby *authorized and empowered to imprison the person and seize and secure the estate*, as well freehold as copyhold, and all other estate, both real and personal, of such collector or collectors to him or them belonging, or which shall descend or come into the hands or possession of his or their heirs, executors, or administrators, wheresoever the same can be discovered and found; and such commissioners who shall so seize and secure the estate of any collector or collectors, shall and they are hereby empowered to appoint a time for a meeting of the commissioners for such division, city, town, or place, and there to cause public notice to be given of the place where such meeting shall be appointed, ten days at least before such meeting; and the commissioners present at such meeting, or the major part of them, in case the accounts of such collector be not duly delivered, or the moneys detained by any such collector or collectors be not paid or satisfied, according to the directions of this act, shall be and are hereby *empowered and required to sell and dispose of all such estates which shall be for the cause aforesaid seized and secured*, or any part of them, to satisfy and pay into the hands of the Receiver-General the sum that shall not be so accounted for, or shall be so detained in the hands of such collector or collectors, their heirs, executors, or administrators, respectively, together with the reasonable costs and charges of recovering, raising, and paying the same: which costs and charges shall be ascertained and settled by the said commissioners, and the overplus (if any) shall be restored to the person who owned the estate before the sale thereof."

before *proceedings are had upon the bond* against the surety. And, what is the distinction between 'proceedings had upon the bond' and 'action brought upon the bond?' " HOLROYD, J., says: "I also think that this bond may be *put in suit* against the surety, although it may happen that another person has been jointly appointed a collector, without first selling the lands and goods of that person; for, the collector contemplated by the act, *whose goods are to be sold previously to the bond being put in suit, is the collector who has made default.*" Having mentioned this case with a view to the understanding of the expressions upon which I was commenting, I beg leave to observe that I would by no means press or strain any inference deducible therefrom. I am quite aware that it is no *authority* bearing upon the present case, nor any thing like it. The *decision* merely is, that, whereas two collectors had been appointed, and one only had made default, it was not necessary to sell the non-defaulting collector's lands and goods before having recourse to the surety. But it is, at the same time, undeniable that both the learned judges do expressly allude (to say no more) to the sale of the defaulting collector's lands and goods as a condition precedent to resorting to the surety. This view of the subject seems to be in conformity to what was very early laid down upon it. (a)

3. The third question I must beg leave to answer with some qualification; the reason for which I hope to make apparent, when, in answer to the next question, I shall have to consider the effect of the rejoinder to the replication to the plea set out, the finding of the jury thereon, and the general result therefrom. If I am to suppose that the commissioners "*had no knowledge*," after due and reasonable diligence exerted by them to ascertain the fact, of the existence of lands and goods of the collector which they might have seized and sold, it seems to me, that, under such circumstances, a good defence could not be made by the surety. If, however, the commissioners "*had no knowledge*," from the same cause that always occasions ignorance—simply, not trying to learn—I think there may be a good defence, from the fact of the possession of lands and goods by the collector, after his default and before action brought, even though the commissioners, upon the supposition last made, were ignorant of the existence of either. This is said upon an assumption at present (to be considered more fully presently) that neither from the statute, nor from any general rule of law, is the surety bound to give any notice, or furnish any knowledge (your lordships, it seems, understanding the expressions to be equivalent) whatever, to the commissioners, of the existence of lands or goods of the collector. I will endeavour to explain my meaning by reference to the pleadings themselves:—Suppose the plea in question to have stood as it does, omitting the allegation of notice: if the replication, by appropriate allegations, had shown reasonable diligence in the commissioners to discover lands and goods of the collector, and that none could be found, it seems to me that such replication

(a) Magna Charta, ch. 8. "How sureties shall be charged to the King."

"We or our bailiffs shall not seize any land or rent for any debt, as long as the present goods and chattels of the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt. And, if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And, if they will, they shall have the rents and lands of the debtor until they be satisfied of that which they before paid for him, except that the debtor can show himself to be acquitted against the said sureties."

would have been an answer to the plea. If, on the other hand, the replication had merely stated that the commissioners had no notice, or no knowledge, of any lands or goods, it would, in my opinion, contain no answer at all, and would be bad on general demurrer.

4. The fourth question raises the points upon which so great a difference and variety of opinion unfortunately exist amongst the judges: and in my answer to this question, I adopt the supposition contained in it, viz. that issue has been joined upon the rejoinder, and that upon that issue there is a finding of the jury in the words stated in the question, and that finding is in its terms for the defendant below: whether it be so in substance, remains to be considered. And for this purpose, it may be necessary to advert to the course and state of the pleadings from the plea in question downwards.

That plea alleges, that before the exhibiting of the bill, the collector had lands and goods within the jurisdiction of the commissioners which might have been seized, &c., of which the plaintiffs had notice. The replication thereto is, that the collector had no lands of which the plaintiffs had notice, and that all the goods of which the plaintiffs had notice were seized and sold, and that, after such seizure, there were no goods, &c., of which the plaintiffs had notice, liable to be seized, &c. The rejoinder (dropping all mention of notice) states that, after failure by the collector, he had lands which ought to have been seized and sold, and that all the goods, &c., of the collector, at his failure, which could and might have been discovered and found, were not seized and sold; and concludes to the country: and the plaintiffs add the *similiter*. And, how far the facts contained in that rejoinder, and the corresponding finding of the jury, amount to a defence, without the fact of the plaintiffs below having notice of such lands and goods, is the question: and that, perhaps, may be tried as conveniently as in any other manner by examining whether the plea in question would have been a good defence to the action, if the allegation of notice had been omitted altogether. The statute is entirely silent upon the subject. The proviso, in especial aid and protection of the surety, contains no allusion to notice from him being requisite: nor is there, in my opinion, any thing in the relation of the surety to his principal requiring any such notice from him. The language of the fifty-second section—"wheresoever the same can be discovered and found"—to which reference has been made upon this part of the case, seems to me to have relation merely to the powers of the commissioners in the pursuit of the property of the collector, and to enlarge those powers. I cannot think that it bears upon the question of notice from the surety, or that it is possible to construe the meaning of the expression to be, that such property as the commissioners had not notice of from the surety must be deemed property "*that could not be discovered and found.*" And, moreover, when, it may be asked, is notice to be given by the surety? It is not pretended that any is due to him; and, accordingly, the first information he will receive of the failure of his principal, and his own liability, will probably be the service of the writ.

But, further, it seems to be material to ascertain what the rule of law generally is with respect to the necessity of averring notice. And, upon this point, I take it to be clear, that where a fact lies equally within the knowledge of both parties, the party pleading need not aver notice to the other; and still less is it necessary, where the means of

knowledge are more especially within the reach of that other. Upon a point I presume hardly questionable, I should be sorry to weary your lordships with unnecessary citation, and will, therefore, refer generally to the case of *Cutler v. Southern*, 1 Saund. 117, and note (2) by Serjeant Williams, and to 2 Saund. 62, a, n, (4.) As this point, however, seems to me to have an important bearing upon the whole subject, I will refer more particularly to one case only of some notoriety, in which this question arose. I allude to the case of *Rex v. Holland*, 5 T. R. 607, which was an information against the defendant, with others, for malversations in office whilst one of the council at Madras, for not having foreseen and provided against the outbreak of Tippoo sultaun. The seventh count of that information charged, especially, that the defendant had not sent notice of the rupture between the Sultaun and the East India Company to the governor at one place and to a general at another. To the information there was a general demurrer; and the objection to the seventh count was, that there was no averment of notice to the defendant of the rupture which he was charged with not notifying to others. The Court, observing that the case was one of great importance, took time to consider of their judgment, which Lord KENYON afterwards delivered. Upon this point he is reported to have said: "The objection (that is, to the seventh count) that notice to the defendant is not sufficiently averred, seemed to be pretty much abandoned by the defendant's counsel, in consequence of what fell from the bench in the argument. The rules stated by Mr. Wood in his argument, seemed to show the true grounds upon which notice is or is not required to be averred." And, upon reference, it will be found that the rule which received the matured approbation and adoption of the Court, is thus laid down:—"Notice here merely means knowledge, (as your lordships understand it in this case;) and, where the matter is as much in the knowledge of the defendant, or more than in any other person, the law presumes that he had knowledge; 16 Vin. Abr. 'Notice,' (A. 2,) pl. 10.—'None is bound by the law to give notice to another of that which that other person may otherwise inform himself of;' and in pl. 12,—'Notice is not necessary where the thing lies as much in the cognisance of the one as the other.' Now, here (continued the late very learned baron) all the facts of which the defendant should have had notice, are of such a nature that it was his duty, as a member of the council at Madras, to know them."

It remains, therefore, to consider how the matter stands as between the surety and the commissioners in this particular; and, in so doing, I shall reject all attempts at an inference arising from general probabilities, (such as the care and foresight of the surety in entering into the engagement, or the contrary—what inquiries he might or might not make into the substance of his principal,) as utterly precarious and insecure.

It seems to me that our duty is to examine what and with whom the means of knowledge are, according to the provisions of the act of parliament itself. Now, so far as the surety is concerned, the statute, as might be expected, is silent as to the recommendation of caution or means of information: he is left to himself. With the commissioners, however, the case is otherwise. By the ninth section, they are to appoint assessors, who are to act upon oath, and moreover are to be charged and instructed by the commissioners in the requisites for discharging their duty. Further, by the same section, the assessors are to

return two or more *able* and *sufficient* persons of the places for which the assessors act, to be collectors. It seems to be clear, therefore, that, in the due performance of their duty, the assessors are bound to inquire into the sufficiency of the persons returned, including, of course, their substance and property; and, if the matter had rested here, it might perhaps have been not unreasonably considered as a statutory mode pointed out to the commissioners of ascertaining by deputed authority the means of the persons to be *appointed*. But the section goes further, and enacts that the persons so returned by the assessors are to be *appointed* by the commissioners; and, as persons are presumed to do their duty, (and particularly when acting upon oath, for the commissioners also are sworn,) it must be taken as against them (the commissioners) that they became acquainted with the property of the persons about to be appointed, and of this collector, amongst the rest; and this supposition and construction is the more probable and reasonable, because the collector is not required by the thirteenth section to find security *at all events*, but only if required by the commissioners. This, therefore, seems to imply that the commissioners ought to inquire in each case, or else how can they exercise a discretion as to requiring or dispensing with security in the case of each appointment? And why, then, is notice to be required from the surety to those who, by the very supposition of having done their duty, have acquired knowledge already?

I have mentioned at the outset that my answer to this question proceeds upon the supposition that there is *an issue joined*, and that, too, in the terms of the rejoinder to the replication to the plea set out. I must, however, take leave to state to your lordships that I entertain great doubt (to say no more) whether there be any issue joined at all; because there certainly is not an affirmation and denial of the *same fact or facts* in that replication and rejoinder, except, indeed, all that is alleged in the replication about notice can be considered as wholly without meaning, which it seems very difficult to say.

Upon the whole, it seems to me that this case is brought abundantly within both or either of the rules or conditions dispensing with the necessity of averring notice. When, therefore, I find that the rejoinder contains the same allegations which would have been sufficient to make the plea good and a defence to the action, and that, on the issue (in the terms stated in the question) raised upon the rejoinder, the finding is for the defendant below, my opinion is that the issue ought to be found for him. It is true that the jury do also find (in the manner stated) "that the commissioners had not notice." But it is to be observed, first, that this fact is not included in the issue, and next, that, admitting the finding of such a fact to be within the competence of the jury, it is not, *without more*, (for the reasons, such as they are, already given at a length, I fear, inconvenient to your lordships,) available for the plaintiffs below. This circumstance, therefore, does not affect the conclusion at which I have arrived, and which is as above stated.

5. To avoid repetition, I have endeavoured to bring together, in answer to the third and last questions, almost all that occurs to me upon the whole subject. And, from those answers, it is obvious that my opinion is against a part of the suppositions contained in this (the fifth) question. Adopting, however, as I am bound to do, those suppositions, my answer is still in the negative; because, first, I do not think there is any such admission as that alluded to; and, next, if there be, that the con-

sequence would follow that judgment *non obstante veredicto* can be entered for the plaintiffs below. It surely cannot be carried to the extent of admitting no notice or knowledge, after due means used to obtain it. Differing, as I have the misfortune to do, from my brother LITLEDALE upon the point of notice, I agree entirely with his observations upon this part of the case in the court below. He is thus reported —2 New Cases, 49, 2 Scott, 62. “The plaintiffs may contend that they are entitled to judgment *non obstante veredicto*, but there seems a great difficulty in saying that; for, the rejoinder is not one which shows that the defendant has no defence on the whole case, which is the ground of entering a judgment for the plaintiff in such case. The finding of the jury that the collector had lands, is not like an allegation which furnishes no defence; but it is part of an allegation which coupled with something else would constitute a defence; and that something else is imperfect, and does not form part of the issue which the jury ought to try, and if found one way would show there was a defence, but in the other way not.”

6. If, as is certainly done continually, a *venire de novo* may be awarded by a Court of Error, it seems difficult to assign any very good reason why it may not award a repleader. My learned brothers, however have almost all expressed an opinion that it cannot be done. Lord HALE in *Bennet v. Holbeck*, 2 Saund. 319 a, 2 Lev. 12, is reported to have said, after referring to many cases in which a repleader had been awarded, “that it is obsolete, and not in use at this day.” The books of practice assume that it cannot be done; and I cannot find any instance of the revival of the usage since the time of Lord HALE. I am not prepared to say, therefore, that a repleader can be awarded.

7. The latter part of the seventh question has been, in substance, answered by what I have already said upon the fifth, viz., that the other pleas, or the issues found thereon, do not in my opinion contain a sufficient confession or afford sufficient proof whereon to found a judgment for the plaintiff upon the whole record. The earlier part involves in it the result of the whole inquiry, which is, in my opinion, that the judgment of the Court below ought to be reversed: but, inasmuch as there does not appear to be any appropriate issue whereon to sustain the finding of the jury in favour of the defendant, which otherwise would have entitled him to it, I do not think that judgment can be pronounced for him.

GURNEY, B. 1. It appears by the special verdict, to which the first question refers, that A. B. was duly appointed collector of the assessed taxes for the year 1828; and that the defendant below duly entered into a bond with a condition for payment by A. B. to the Receiver-General of the taxes of all the sums collected and received by him and which came to his hands as collector for the year 1828; but that he did not pay all those sums to the account or service of that year, but a part only, and the residue he paid to the account or service of former years for which he had been collector,—for which former years the party in this cause was not surety. The plain and necessary result from this statement is, that A. B. violated his duty, and that the bond is forfeited. The appointment is for the year 1828. The duty under that appointment is confined to that year. The bond is for the due performance of his duty for that year. It was his duty to apply the collection of that year to the account or service of that year. The application of any part of the money collected under the assessments of that year.

to cover any deficiency in any former year, is just as much a breach of his duty, and a forfeiture of this bond, as if he had paid the money to any other creditor, or lost it at the gaming-table. The suretiship was for the conduct of the collector in the year 1828, and no other. Neither the collector nor the surety was contemplated in any other character than as collector and surety for that year. The collector for the former year might have been different; the sureties for the former year *were* different: but these circumstances cannot make any difference in the consideration of this question.

2, 3. The second and third questions are, whether this action can be maintained against the surety until the commissioners shall have sold the lands, goods, and chattels of the collector within their jurisdiction; and your lordships have propounded questions to the judges founded upon the different suppositions of the commissioners having and not having notice of that fact.

I am of opinion, that, if the collector had lands, goods, and chattels within the jurisdiction of the commissioners, they could not put the bond in suit: and I do not think that their right of action is affected by their knowledge or their ignorance. The statute 43 G. 3, c. 99, s. 13, directs the security to be given by the collector, with the two sureties, by a joint and several bond: and directs that every such bond given by way of such security, shall be prosecuted by the commissioners on any failure or default of the collector: "Provided always, that no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector, in pursuance and by virtue of the directions and powers given to the respective commissioners by this act." If, therefore, the collector has lands, tenements, goods, or chattels, I think that the sale of them by the commissioners is a condition precedent. This proviso holds out to the persons who become sureties for collectors, that they shall not be resorted to until all the means of payment from the property of the collector shall have been exhausted. And if that be not fulfilled to the very letter, I think that the surety does not receive the security or advantage which is held out to him by this proviso.

I admit that this question of knowledge is not free from difficulty. It may be said that a fact of which the commissioners are ignorant, is the same as a fact that does not exist. The special verdict upon which these questions are founded, however, shows that the ignorance of the commissioners in this instance arose from a want of due diligence, as the jury found that the collector had lands and goods, and that the commissioners had reasonable grounds for believing that he had. Another observation serves to show that knowledge or ignorance does not enter into this question. If knowledge be necessary, it must be, I apprehend, the knowledge of the two or three commissioners who are the obligees in the bond. The commissioners consist of a large number of persons: it may happen that these two or three persons may be utterly ignorant; whereas a hundred and fifty others may have entire and perfect knowledge. The act of parliament does not require that the knowledge shall be brought home to the obligees of the bond, nor even to the commissioners, or any of them; and I do not think that that can be superadded. It is the safer and the sounder construction of the act, to consider this as an absolute condition precedent.

In discussing this point, it has been remarked that the fifty-second section, to which the proviso refers, does not make the proceeding by the commissioners against the collector *compulsory*—that it merely *impowers* the commissioners to proceed. I have given the fullest consideration to this argument; but it does not appear to me to be satisfactory. The fifty-second section *impowers* the commissioners to *seize*, and *requires* them to *sell* the collector's property. The thirteenth section, I think, peremptorily requires that the commissioners shall exercise that power before they resort to the surety. It may be said that this construction of the statute may materially embarrass the commissioners in prosecuting the sureties of the collectors who are defaulters. Undoubtedly it may: but I do not think that violence is to be done to the express words of an act of parliament, for the purpose of relieving the commissioners from embarrassment. Another act of parliament may be passed which may be free from ambiguity. These cases of embarrassment, I fear, always arise from neglect of duty. If commissioners did their duty, collectors would not have the opportunity of committing such enormous embezzlements, and their sureties would escape the ruin with which they are sometimes overwhelmed. In the case of *Peppin v. Cooper*, 2 B. & Ald. 431, it was not necessary to decide this precise point, as the question there made was, whether or not the goods of another collector must be first sold. But that argument necessarily brought this proviso under the consideration of the Court; and Lord TENTERDEN, speaking of the collector, speaks of him as one—"whose land and goods must be sold before proceedings are had upon the bond against the surety."

4. The answer to the second and third questions includes the answer to this question—that the issue ought to be found for the defendant.

The view which I have taken of the case renders it almost unnecessary for me to answer the remaining questions.

5. The answer to the fifth question is included in the answer to the fourth; and is, that judgment cannot be entered for the plaintiffs *non obstante veredicto*, on the implied confession in the rejoinder to the replication to the plea set out, that the plaintiffs had no notice of the existence of the lands and goods in question.

6. I am of opinion that a repleader cannot be awarded by a Court of Error. That is laid down by Lord HALE, in 2 Saund. 319 *a*. One hundred and seventy years have elapsed since, and no instance has occurred from that time to this.

7. I think that the judgment for the plaintiffs ought to be reversed.

PATTESON, J. 1. In answer to the first question proposed by your lordships, I am of opinion that the conduct of A. B., as therein described, was a breach of the condition of the bond therein mentioned. The words of the condition of that bond are, that he shall "well and truly pay or cause to be paid unto the Receiver-General of the said taxes, rates, and duties for the county of Middlesex, all such sum and sums of money as shall come to his hands as such collector, upon the days and at the times by the said acts appointed for the payment thereof, *and according to the true intent and meaning of the said acts.*" The intent and meaning of the said acts, amongst other things, was, that the moneys collected in each year should be carried to the account of such year. Now, though A. B. paid to the Receiver-General all the moneys collected by him in the year in question, yet he did not pay the whole

to the account of that year: he did not, therefore, pay the moneys *according to the true intent and meaning of the acts*. He paid them in discharge of a debt which he owed in respect of the collection of former years, in violation of the intent and meaning of the acts; whether with the consent of the Receiver-General or not, seems to be immaterial; and his conduct in so doing seems to me to be as much a breach of the condition of the bond, as if he had applied the moneys to the payment of any other debt which he owed.

2. To the second question proposed by your lordships, I answer, that, in my opinion, it is a defence to an action brought by the commissioners on the bond, that they did not, before suit, seize and sell the lands and goods of A. B. of which they had knowledge. That is an action against a surety who has entered into a bond under the provisions of an act of parliament—43 G. 3, c. 99. Before entering into that bond, he would naturally look at the act, with a view to discover the nature of his engagement, the liabilities he was to incur, and the means of protection afforded him: he would construe the act in the plain and obvious sense which its language imports: and surely he would have great reason to complain if a Court of Law, upon any question of his liability arising, should put a forced and technical construction on that language, to his prejudice. He finds that the act, in the thirteenth section, directs the commissioners, in case of default in the collector, to prosecute, i. e. put in suit, the bond; provided always “that no such bond shall be put in suit against *any surety or sureties* for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector in pursuance and by virtue of the directions and powers given to the respective commissioners by this act.” Those directions and powers are contained in the fifty-second section of the act, which authorizes and empowers (not requires) the commissioners, in cases of default, to make sale in a summary manner of the collector’s lands and goods, wheresoever the same can be discovered and found. The commissioners are not obliged to seize and sell the collector’s property: they may put the bond in suit against him without doing so; for *he* is not within the proviso in the thirteenth section: yet they may first seize and sell the collector’s property, if they please, and may afterwards put the bond in suit against him; and, if they do so, it is plain, that, as the bond comes within the 8 & 9 W. 3, c. 11, s. 8, they cannot recover more than what remains due after deducting the produce of the sale. Now, the proviso in the thirteenth section was obviously intended to put the surety in a better situation than the collector: but, if that proviso be not held to constitute a condition precedent, their situation will be precisely the same. And, indeed, it seems to me to be impossible to give any effect at all to that proviso, except by construing it as any unlearned man would do, viz. as a condition precedent. It has been suggested that the commissioners might exercise their powers under the fifty-second section, for the benefit of the surety, after enforcing the bond against him, and so give effect to the proviso. But, on examining again the words of the fifty-second section, it is clear to my mind that the commissioners could not be justified under it in making sale of the collector’s property to satisfy a debt which had been already discharged by the surety, and, as far as the commissioners are concerned, altogether satisfied. That section empowers the commissioners to seize the collector’s property, if he shall neglect to pay any sums re-

ceived by him: but they are not at once to sell; they are to give ten days' public notice of a meeting: and, in case the moneys be not paid and satisfied, they are *required* to sell, to satisfy, and pay into the hands of the Receiver-General the sums due, with costs and charges, and render the overplus to the owner of the property. It seems to me, that, if the surety has paid the moneys due before any seizure of the collector's property, it cannot be said that the collector has neglected to pay, so as to authorize the commissioners to seize, within the meaning of that section; nor, again, if they could seize and hold a meeting with ten days' public notice, could it be said that the moneys due were not paid and satisfied, so as to require or empower them to sell: nor, if they did sell, could they pay the moneys into the hands of the Receiver-General, he having already obtained the amount from the surety. The powers given by that section are, as I apprehend, primarily intended for the benefit of the commissioners in the exercise of their public duty: and, if they have no longer any public duty to perform, which they have not as soon as the moneys due are paid, they have no right to exercise those powers. The benefit to the surety from the exercise of those powers seems to be a secondary object, and arises only from the proviso contained in the thirteenth section. Without that proviso, the surety could have no right at any time to call for the exercise of those powers for his benefit; and, as the terms of that proviso plainly relate only to a sale antecedent to his being sued, I am at a loss to see by what construction of the act he could call for the exercise of those powers after he had paid the money.

3. The third question proposed by your lordships is one upon which I have entertained much doubt: but I have come to the conclusion that it *is* a defence to the action, that the commississioners did not seize and sell lands or goods of the collector, if any such existed, although they had no knowledge of their existence. No words can be found in the act of parliament which require any such knowledge; and there are provisions as to the appointment of collectors, by which the commissioners have the means of knowing whether they are able and sufficient persons. Those provisions, indeed, apply only to the time when the collectors are appointed, and do not give the commissioners any greater facilities for discovering the property of the collectors than any other person may have. It may be said, that, if the mere existence of any such property, though unknown, and perhaps concealed, and therefore not seized and sold, were to defeat the remedy against the surety, it is obvious that much opportunity for collusion and fraud would be afforded, and all attempts to enforce the payment of moneys by the surety might be from time to time defeated, without any real neglect on the part of the commissioners; and that it is very reasonable to require that the party for whose benefit a seizure and sale are to take place, should give such information to the commissioners as will enable them to make such seizure, or at all events should not set up the want of such seizure as a defence, unless he can establish that the commissioners have been guilty of a culpable neglect in not making it. Every act of parliament, as well as any other document, must have a reasonable construction; and I apprehend that such construction ought to prevail as will effectuate the obvious intention of the legislature, provided no violence be done to the language which it has adopted. It may also be said that the very object and intention of the legislature in requiring that the collector

tor should find sureties, will be frustrated if it be held that the existence of any unknown or concealed property of the collector will defeat the remedy against the surety; at the same time that the benefit intended for the surety may be amply preserved by requiring the seizure and sale of the known property of the collector as a condition precedent to his being sued for the moneys due. These reasons led me upon a former occasion, 2 New Cases, 21, (29 E. C. L. R. 228,) 2 Scott, 36, to entertain the opinion that knowledge of the existence of such lands and goods was necessarily implied in the proviso which limits the power of suing the surety. I am, however, free to confess, that, after further consideration of the act of parliament, I am not so sure of the intention of the legislature as to feel that I was warranted in entertaining that opinion: and, as it may be possible, that, by putting such a construction upon the act, I am altering or adding to it, instead of simply interpreting it. I feel myself bound to abide by the literal meaning of the words, and to hold that the existence of any unsold lands or goods which the commissioners might have seized and sold, is a bar to the action, whether they knew of them or not.

4. In answer to the fourth question proposed by your lordships, I am of opinion that the issue raised by the rejoinder (if any issue at all be raised) ought, upon the finding of the jury, to be found for the defendant. In considering the effect of similar pleadings upon a former occasion, 2 New Cases, 22, (29 E. C. L. R. 228,) 2 Scott, 37, I came to the conclusion that the issue, though informal, involved the question of notice. I am free to confess, that, upon further consideration, I think that I then came to a wrong conclusion. The replication here asserts that A. B. had no lands *of which the plaintiffs had notice*, that all the goods of A. B. *of which the plaintiffs had notice* were seized and sold, and that A. B. had no other goods *of which the plaintiffs had notice*. The rejoinder asserts that A. B. had lands *which might have been sold*, and that all the goods of A. B. *which might have been discovered and sold*, were not seized and sold, and concludes to the country; and the plaintiffs add the *similiter*. Here is an assertion on the one side and denial on the other; put the replication and rejoinder together, and the separate assertions of the plaintiffs and defendant will be found jointly to amount to this—that A. B. had lands and goods which might have been sold, but of which the plaintiffs had no notice. The plaintiffs have not denied the existence of lands and other goods besides those sold, *simpliciter*, but only the existence of lands and other goods *of which they had notice*. The defendant has not asserted the existence of lands and other goods *simpliciter*, but only the existence of lands and other goods which might have been sold. The replication relates to lands and goods of A. B. in a particular condition or predicament: the rejoinder relates to lands and goods of A. B. in another and different condition or predicament. The more I consider the matter, the more satisfied I feel that no issue at all is raised by the rejoinder; neither an informal issue, which would be cured by verdict; nor an immaterial one, which cannot now be cured at all. But, if any issue be raised, I think that it must be an issue in the words used by the defendant in his rejoinder, which concludes to the country, and which do not involve the question of notice: and, if it be an issue in those words, it ought to be found for the defendant.

5. The fifth question proposed by your lordships is one which, ac-

ording to my view of it, is of very general importance as a question of pleading. It involves the consideration whether any pleading which concludes to the country (except, perhaps, the anomalous statutable plea of bankruptcy) contains any confession of the matters stated in the previous pleading and not denied. Here I take the issue, (if any there be,) as I have already stated, to be in the words of the rejoinder, and to be an immaterial issue, for want of involving the question of notice—assuming always, as this question does, that notice is material. Still, as the rejoinder concludes to the country, and tenders an issue, it must be taken to traverse the whole or some part of the replication. Clearly it does not traverse the whole; it omits that part of the replication which relates to notice, and traverses the seizure and sale of all the lands and goods which might have been seized and sold. Now, the distinction between pleadings by way of traverse and pleadings by way of confession and avoidance, is familiar to all lawyers; and it is the latter only upon which questions of this sort have hitherto arisen. One of the last cases on this subject is that of *Gale v. Capern*, 1 Ad. & E. 102, (28 E. C. L. R. 46,) 3 N. & M. 863, in which the defendant pleaded by way of set-off, a promissory note alleged to have been made by the plaintiff to a third person, and by him endorsed to the defendant: the plaintiff replied, that the said supposed debt on the said promissory note did not arise within six years. It was contended that this replication was no confession of the making and endorsing of the note, that it was not only a denial of its having been made and endorsed within six years, but a denial that it was ever made and endorsed. The Court, however, held otherwise, and considered the replication as a pleading by way of confession and avoidance, and not by way of traverse. The replication there concluded, as it of necessity must, to the Court, because it introduced new matter. The case of *Lambert v. Taylor*, 4 B. & C. 138, (10 E. C. L. R. 293,) 6 D. & R. 188, does not go to the same length; indeed, in the judgment there delivered by Lord TENTERDEN, it is admitted for the purposes of the cause, that the plea of the Statute of Limitations, as generally pleaded, does not admit a cause of action. Unquestionably, for the purposes of trial, a traverse of one out of several allegations in the preceding pleading admits the facts stated in the other allegations, and renders it unnecessary to adduce any evidence in support of them: and so far it is an implied confession of them: yet it seems to be only a confession *sub modo*, and not an absolute confession, as all pleadings are which go on to attempt an avoidance. I have always understood that judgment, *non obstante veredicto*, is only to be allowed in a very clear case, where the defence set up is good in form and true in fact, but insufficient in law, and so the pleadings show that the defendant has no defence upon the merits in any way of putting his case. Now, that is by no means the result where the plaintiff has averred some fact amongst others, showing together a sufficient cause of action, but which fact, being separately traversed, turns out to be immaterial. In such a case, how can it be said that, if the traverse had been properly taken, the jury might not still have found for the defendant? for, I am not now considering the effect of any special finding of the jury, but simply of their finding in the words of the issue. Besides which, there is in this case a good plea, containing an averment of notice, and that plea is not disproved in any material part of it; for, the issue which

arises out of it is by the hypothesis immaterial. Unless, therefore, the averment of notice be treated as struck out of that plea, and the plea be rendered bad, the plaintiffs cannot have judgment *non ob-
stante veredicto*. Now, the dropping of that averment in the rejoinder, at the most amount only to a departure in pleading, which makes the rejoinder bad; it cannot have the effect of striking out that averment from the plea itself. In a very recent case in the Court of Exchequer the distinction between a judgment *non obstante veredicto* and a repleader was much considered. I allude to the case of *Plummer v. Le-
2 M. & Welsby*, 495, 5 Dowl. 755. That was an action of debt on an award, by an administratrix: the declaration stated, that, on the 1st July, 1833, a settlement of part of the accounts took place between the deceased and the defendant; it then stated a submission to arbitration by the plaintiff as administratrix and the defendant, and an award: the first plea traversed the making of an award; the second traversed that the settlement took place on the day mentioned in the declaration: the third traversed the making of such settlement at any time. On the trial, the plaintiff had a verdict on the first and third issues, the defendant on the second. After argument, and time taken to consider, the Court held that the second plea did not contain any confession, and that judgment *non obstante veredicto* could not be given, but awarded a repleader. This case appears to me to be a direct authority to show that the traverse of an immaterial allegation is not to be taken as an absolute confession of the other allegations in any pleading.

Upon the whole, therefore, I am of opinion that the verdict cannot be entered for the plaintiffs on an implied confession in the rejoinder.

6. In answer to the sixth question, I am of opinion that a repleader ought to have been awarded, in the case stated, by the Court below. I think, however, that a Court of Error cannot so award. Lord Chief Justice HALE expressly states that in his time the practice of awarding a repleader in the Court of King's Bench, upon error from the Common Pleas, was obsolete and not in use: *Bennet v. Holbech*, 2 Saund. 319. and so it has been laid down in our books of practice ever since. Upon a writ of error, the parties are not before the Court upon a day given: and, though a practice may have prevailed in ancient times for the Court of King's Bench to award a repleader, into which court the record itself was always removed from other courts on a writ of error, and became a record of the King's Bench; yet it does not appear that any such practice ever prevailed in the House of Lords; nor, I believe, is any instance known in which parties have pleaded before the House of Lords, or in which that House has ever issued jury process, or given any judgment except on a writ of error brought; yet such must be the consequence if a repleader be awarded in the case supposed by the sixth question; unless, indeed, the transcript of the record be remitted to the court in which the original pleadings took place, with a direction that the parties should replead before that Court—a course of proceeding for which no precedent, I believe, can be found.

7. The seventh question proposed by your lordships raises a considerable difficulty. In answer to it, I am of opinion that, if there be but one issue on the record, and that be an immaterial issue of such a nature that the Court below ought to have awarded a repleader, but has in fact given judgment for one of the parties, a Court of Error ought simply to reverse such judgment, without giving any judgment in favour

of the other party. But, where there are several pleas, some or one of which, or the issues found thereon, contain a sufficient confession, or afford sufficient proof, whereon to found a judgment for the plaintiff, whether the immaterial issue on the other plea shall thereby be aided, is a matter of some nicety. No authority can of course be found upon this subject in the older reports, before the statute of Anne, which introduced several pleas, 4 Anne, c. 16. Nor have I been able to find any direct authority since that time, except the case of *Goodburne v. Bowman*, 9 Bingh. 532, (23 E. C. L. R. 369,) 2 M. & Scott, 700. In that case, the rule, "that, in considering the merit or demerit of one plea, recourse cannot be had to another, unless expressly referred to," is fully recognised; but it is said that an application to enter judgment *non obstante veredicto* is founded upon the whole record, and therefore that all the pleas may be taken into consideration. With the greatest respect for that Court, I must confess that I have great doubts as to the soundness of the view there taken as to the effect of several pleas. It seems to me to be essential to the due course of pleading, and to avoid confusion, that no blending of pleas should in any instance be permitted, and that, whatever may be the number of pleas placed upon the record, each plea should be treated, both in itself and in its consequences, as if it were the only plea on the record. It is to be observed that, in that case, the Court intimated an opinion that the pleas respectively did contain a sufficient confession; and therefore what was said as to the finding on the plea of not guilty being received in aid of any supposed defect in the other pleas, was in some measure extrajudicial, though entitled to the highest respect. The present case, however, is distinguishable from *Goodburne v. Bowman*, inasmuch as in that case the pleas themselves, out of which the immaterial issues arose, were held bad; but here the plea out of which the immaterial issue arose is good, and, therefore, even if the finding on that issue be disregarded, still the plaintiffs cannot have judgment; for the good plea not disproved still remains a good bar to the action. The case of *Goodburne v. Bowman* came under consideration in the Court of Exchequer in the case of *Plummer v. Lee*, 2 M. & Welsby, 495, which I have already cited; but a distinction was taken between them, inasmuch as in the latter case, no one of the pleas concluded to the Court, and no one contained an absolute confession. In that case, the immaterial traverse was of an allegation in the declaration: and, even supposing that the Court might, under those circumstances, have entirely disregarded the finding on that issue—not so as to have aided that immaterial issue by the allegations in the other pleas, but treating it as if no such traverse had been taken—yet, in the present case, that course cannot be pursued, because, to disregard the immaterial issue, would be also to disregard the plea out of which it arises, which is an affirmative plea, and contains a good answer to the action, and has not been disproved in any material part of it.

My answer, therefore, is, that, upon these pleadings, judgment cannot be given for the plaintiffs, disregarding the immaterial issue; neither can judgment be given for the defendant; but the judgment of the Court below must be simply reversed.

BOSANQUET, J. 1. I am of opinion that the conduct of the collector amounted to a breach of the condition of the bond. Payment of the money collected in 1828 to the account of former years, was as much a breach of duty as payment to one of the collector's own creditors.

2. I think that neglect of the commissioners to seize and sell lands and goods of A. B., of which they had knowledge, before action brought, is a defence to such action. It appears to me that the proviso, which is introduced for the benefit of the surety, makes such seizure and sale a condition precedent to putting the bond in suit, where the commissioners have knowledge of the existence of such lands and goods.

3. But I think that, unless the commissioners had such knowledge before the commencement of the action, the existence of such lands and goods within their jurisdiction is not a defence; for the proviso must receive a reasonable construction. The thirteenth section of the 43 G. 3, c. 99, directs the commissioners to prosecute if the collector makes default, which direction is followed by a proviso that the bond shall not be put in suit for any deficiency, other than what shall remain after sale of the lands and goods of the defaulter. But, if the commissioners had no knowledge of such lands or goods, they are bound by the directions of the statute to prosecute. The legislature cannot with reason be supposed to have intended that the commissioners should delay the commencement of a prosecution against the sureties until they should have ascertained by all possible means whether or not the collector is possessed of any lands or goods; and that, if after such suit commenced, any the smallest portion of property should be discovered, a suit honestly commenced pursuant to the direction of the statute should be defeated by a plea of the existence of such minute amount of property within their jurisdiction. Possibly, if the existence of property were communicated to the commissioners after action brought, proceedings against the surety might be stayed until the property had been sold, and the deficiency ascertained; but, whatever might be the effect of an application for a stay of proceedings, the question now is, whether the proviso creates an unqualified condition precedent, or only a condition qualified by knowledge of the commissioners. And I cannot think that it was intended, by the introduction of this proviso, to render it impossible for the commissioners, with any safety, to comply with the directions to prosecute.

It has been suggested, as an objection to this construction, that, if by notice to the commissioners, is meant notice to all the commissioners, it would be next to impossible to comply with such condition, considering the great number of persons who fill that character: and that, if notice to less than all be sufficient, a notice to one who may have no knowledge of the bond, would be sufficient to defeat an action duly commenced by the obligees. But, in putting what I think a necessary limitation on the words of the statute, to prevent unreasonable consequences, I do not feel myself driven to adopt a condition the compliance with which would be either impracticable or nugatory. The commissioners are directed to appoint a clerk: and any two commissioners may act. There can be no doubt that notice to such clerk would be sufficient: so, likewise, would notice to the obligees on the bond, or to either of them, or to either of the commissioners who direct the bond to be put in suit in the name of the obligees. But I neither think that notice to all the commissioners is necessary, nor that notice to a person who, though a commissioner, does not act as such, would be sufficient to constitute a defence. The notice of which the necessity is brought into question upon the pleadings in this case, is a notice to the plaintiffs, the obligees in the bond, previous to the commencement of the

action. And I think, that, whatever would amount to notice to them, would be sufficient: but nothing else.

4. I think that the issue joined on the plea set out ought to be found for the defendant. The issue tendered by him, viz., that there were lands and goods of A. B. within the jurisdiction, has been found in his favour. The notice which is negatived by the finding, forms no part of the issue; nor the allegation that the commissioners could and ought to have sold, which is an inference of law.

5. Supposing the verdict to be entered for the defendant on the said issue, and supposing it is not a defence to the action, that the lands and goods of A. B. were not sold by the commissioners, unless they had notice (meaning knowledge) of their existence, still I think that the judgment cannot be entered for the plaintiffs *non obstante veredicto*, on an implied confession in the rejoinder, that, if there were lands and goods, the commissioners had no notice of their existence. The plea alleges that A. B. was possessed of divers lands and goods of which the plaintiffs had notice, and which might have been seized and sold, but which lands and goods then continued unsold. The replication avers that there were no lands which the commissioners could seize and sell of which they had notice, and that they had seized and sold all the goods and chattels of which they had notice. It admits the existence of some property, and that the commissioners had notice of it: but insists upon the sale of all the property of which they had notice. Notice of unsold property is therefore alleged on the one side, and the want of notice of any property unsold is asserted on the other. The frame of the replication clearly invited the defendant to take issue in the terms of it, by which the sale of all the property known to the commissioners would have been denied. But the defendant by his rejoinder avoided such denial, departed from the good defence set up by his plea, and chose to rely on the mere existence of property within the jurisdiction, as a new ground of defence: nevertheless, I cannot say, that, by omitting to reassert in his rejoinder the notice which he had alleged in his plea, he has so confessed the want of notice as to authorize a judgment against him, founded on such a confession. In *Staples v. Heydon*, 2 Lord Raym. 924, Lord Chief Justice Holt took this difference: that "where the defendant confesses a trespass, and avoids it by such matter as can never be made good by any sort of plea, there, in such a case, judgment shall be given upon the confession, without regard to such an immaterial issue: but, where the matter of the justification is such a matter as if it were well pleaded would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action:" and he added—"The books do all of them, if they be narrowly looked into, turn upon this difference, where the confession is full, and the matter of the plea is ill in substance."

6. But, though judgment *non obstante veredicto* cannot be given upon an implied confession in this plea of want of notice, it does by no means follow that a replender ought in such a case as this to be awarded. If the fault of the rejoinder had consisted in a defective mode of pleading the matter relied on, some ground might be afforded for a replender, supposing that proceeding could be awarded after a writ of error. But, here, the ground taken for the defence in the rejoinder is defective upon the merits, and cannot by any pleading be made available. The defendant having studiously declined to insist upon the

notice mentioned in the plea, and chosen to put his defence upon the mere existence of lands and goods within the jurisdiction, could not make that defence good by any sort of amendment. His omission to include in his traverse the want of notice, was no mistake or mere error in form. A judgment *non obstante veredicto* is always upon the merits; a repleader, upon the form or manner of pleading. Tidd's Practice, 9th edit. 922. But, whether a repleader ought or ought not to have been awarded in the court below, it cannot, I apprehend, be awarded by a Court of Error, according to the express authority of Lord HALE in *Bennet v. Holbeck*, 2 Saund. 319 a, 2 Lev. 11: and, even if it could, I am of opinion that it ought not to be awarded in this case, since it could have no other effect but that of enabling the defendant to set up some new defence.

7. The seventh question involves two inquiries; first, whether the pleas and issues contain a sufficient *confession* whereon to found a judgment for the plaintiffs, disregarding the immaterial issue; secondly, whether they afford sufficient *proof* to found such judgment.

I have already stated my opinion in answer to the fifth question, that the rejoinder to the replication to the plea set out does not contain a sufficient confession of want of *notice* of unsold property to authorize such a judgment. But, although want of notice be not confessed, still it appears to me that by the same rejoinder the plaintiffs' *cause of action* is confessed; and consequently, that, if it be not sufficiently answered, (which, for the reasons already given, I think it is not,) the plaintiffs are entitled to judgment. The ground of the plaintiffs' right to recover is, the breach, by the collector, of the condition of the bond, in neglecting to pay to the Receiver-General the sums collected for taxes. The declaration, as usual, states a money bond payable to the plaintiffs on request, in the terms of the instrument. Oyer of the condition having been had, but no breach then assigned, the defendant, in one plea, pleads performance generally; and then, in the plea set out, alleges as a defence to any right to recover on the bond, that the collector faithfully collected all sums of money from every person charged, and in every case, long before the commencement of the action, and from thence continually hitherto was possessed of lands and goods within the jurisdiction of the commissioners of which the plaintiffs had notice, and which might have been sold, but which were unsold. This appears to me to have been a good plea. The plaintiffs having before, in their replication to the plea of performance, assigned *non-payment* to the Receiver-General as a breach of the condition, proceed in their replication to the plea set out to allege in answer thereto, that, after the collector had collected, and after he *had neglected to pay to the Receiver-General*, as in their replication to the former plea the collector had no lands which they could sell of which they had notice, and that all the goods of which they had notice were sold. The effect of this allegation is, that the condition of the bond had been broken, and that there were no lands or goods of the collector which the commissioners were bound to sell after the breach of the bond had been committed. The defendant in his rejoinder to this replication, does not merely omit to traverse the neglect to pay to the Receiver-General, but expressly says, that, *after* the supposed collection and receipt of the money, and after supposed omission and *neglect* to pay the Receiver-General, the collector had lands and goods within the jurisdiction, which might have been

sold; thereby admitting, as it appears to me, that the condition of the bond had been broken by such non-payment to the Receiver-General, and relying on matter insufficient to excuse the defendant from responsibility upon the bond. He that excuses a non-performance, supposes it. *Meredith v. Allen*, 1 Salk. 138.

If this view of the pleadings be correct, then the plaintiffs will be entitled to judgment *non obstante veredicto*, upon the confession in the rejoinder of the plaintiffs' cause of action, notwithstanding the verdict on the immaterial issue. Had the matter of this rejoinder been originally pleaded as a defence, instead of the plea set out, (supposing such defence to be insufficient in substance,) the plaintiffs would, I apprehend, be entitled to judgment notwithstanding the verdict found upon the issue tendered by it, on the ground of the confession of the cause of action which it contains. And, if that be so, I can see no reason why the existence upon the record of the plea which has been departed from and abandoned as the ground of defence, should deprive the plaintiffs of the benefit of this confession.

If the rejoinder to the replication to the plea set out does not contain such a confession of the plaintiffs' cause of action so as to entitle them to judgment thereon, I am not aware of any pleading on this record by which it is more distinctly confessed. Supposing, therefore, that no such confession appears, the remaining question will be, whether, notwithstanding the verdict found for the defendant upon the immaterial issue tendered by this rejoinder, the plaintiffs are not entitled to judgment upon the rest of the record. Before the statute of Anne, which allowed defendants to plead several pleas, a motion for judgment *non obstante veredicto* could only be founded on the confession contained in the same plea on which the issue arose. "If," as Lord Chief Justice TINDAL says, in *Goodburne v. Bowman*, 2 M. & Scott, 713, "such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied." If, however, several defences are pleaded, one of which is wholly insufficient and incapable by amendment of being made a good defence, and upon which, therefore, no replender ought to be awarded; and other defences are well pleaded, upon which material issues are joined and found for the plaintiffs; I do not see any good reason why the plaintiffs should not be allowed to take advantage of the finding upon those issues, in the same manner as they might do if the ineffectual defence had not appeared upon the record. In *Goodburne v. Bowman*, the lord chief justice further says: "In the present case, there is a verdict on the general issue, which finds that the defendant did publish the libels. And although, in considering the merit or demerit of any individual plea, recourse cannot be had to another unless expressly referred to by such plea; yet, as the application to enter a verdict is founded on the whole record, by which it appears that the defendants have committed the grievance complained of, and have not shown any sufficient justification, it may be considered in that point of view, that there is enough to warrant the application." In that case, indeed, the Court thought that the special pleas did sufficiently confess the action, but did not sufficiently avoid it: but, if the principle above mentioned be correct, the plaintiff may avail himself of a finding by the jury, as well as of a confession of the defendant notwithstanding a verdict for the defendant upon an immaterial issue: provided a replender ought not to be awarded: and it must be observed

that the lord chief justice took care to show that the defendants were not in that case entitled to a repleader.

Then, how does this case stand upon the record? The plaintiffs declare upon a bond: oyer is demanded of the condition: the execution of the bond is denied by the defendant, and found for the plaintiffs. Then, performance of the condition is pleaded, to which the plaintiffs reply a breach, by non-payment of money to the Receiver-General. The defendant in his rejoinder alleges payment; on which an issue is joined, and found for the plaintiffs to a certain amount, viz. 693*l*. Fraud and covin in obtaining the bond are pleaded, which are negatived by the jury. Two other pleas are demurred to, upon which judgment is given for the plaintiffs. No material issue either in law or fact has been found for the defendant. But an immaterial issue is found for the defendant, arising upon a rejoinder which is defective, not merely in form, but in showing any answer in substance to the plaintiffs' right of action, capable of being made good by any amendment in form. If this pleading had not been brought upon the record, the plaintiffs would have been entitled to judgment. Upon what principle, then, are they to be deprived of the benefit of all that has been established in their favour, in consequence of a proceeding which is wholly ineffectual, entitling neither the plaintiffs nor the defendant to judgment? And, why may not such a proceeding be disregarded as altogether nugatory? Authority upon the subject is not to be looked for in the older books, since no such case can have arisen before the statute of Anne, already referred to. The only modern case upon the point of which I am aware is that of *Goodburne v. Bowman*, the principle to be collected from which, is, that, where a verdict is found upon an immaterial issue in a case which does not authorize the award of a repleader, and the whole cause of action is confessed or proved upon some other plea or pleas on the same record, the plaintiffs are entitled to judgment. This case was adverted to in *Plummer v. Lee*, 2 M. & Welsby, 495; and, though the principle is said to have been suggested in *Goodburne v. Bowman*, for the first time, the justice of it is not controverted, but the case is distinguished from that before the Court, on the ground, that, in the latter, no plea contained a confession of any part of the cause of action, and there was no issue (found) upon any plea establishing the truth of the whole of it: and a repleader was awarded. The principle promulgated in *Goodburne v. Bowman* appears to me to be consistent with reason and justice.

The award of a *venire de novo* to try the immaterial issue, would be wholly useless; and, as this is not a case for a repleader, I humbly offer my opinion to your lordships, though certainly not without hesitation, in consideration of the novelty of the case, and in deference to the opinions entertained, I believe, by my learned brothers, that judgment may be entered for the plaintiffs upon the whole record, on the ground that the issues found thereon contain sufficient proof whereon to found a judgment for the plaintiffs, disregarding the immaterial issue.

PARKE, B. 1. My answer to the first question proposed by your lordships, is, that, in the case suggested, the conduct of A. B. was a breach of the condition of the bond by which he was "well and truly" to pay to the Receiver-General all the sums of money collected by him, according to the true intent and meaning of the statutes 43 G. 3, c. 99, and 3 G. 4, c. 88.

It seems to me that this condition is to be construed precisely in the same way as if another person had been collector for a former year, the appointment being annual; and it could not admit of the least doubt but that it would have been a breach of such a condition, if the money received, instead of having been paid to the Receiver-General, to the account of the year for which it was received, had been lent to a former collector, to enable him to pay his arrears, although that collector had really so applied it. The question is precisely the same, so far as relates to the breach of the condition of the bond; and the payment to the account of a wrong year is in effect an appropriation by A. B. to the payment of his own debt; though certainly the damage is not the same, from the circumstance of this debt being due to the public, as if he had applied it to the payment of a private debt of his own. It makes, however, a most material difference to the parishioners, who are a fluctuating body, whether the collections of each year are paid to the account of that year or to that of a former year for which the same person has acted as collector. In the latter case, suspicion is lulled, and no inquiry made, until the sureties of the former year, or the collector himself, are dead or insolvent; and the inhabitants of the parish are rendered liable for the arrears due from their predecessors, and have the amount levied upon them;—an evil which might have been avoided, if each year's collection had been duly paid, as it ought to have been, to the account of that year.

2. In answer to the second question proposed to her majesty's judges, I have humbly to state the same opinion which I did in the court below—that it is no defence to the action on the bond, that the defaulter had lands and goods within the district, and that the commissioners had knowledge of their existence before the action brought, and did not before suit seize and sell them. This question depends entirely on the proper construction to be put on the 43 G. 3, c. 99, s. 13, coupled with other provisions of that statute.

The thirteenth section of the 43 G. 3, c. 99, enacts that security shall be given by collectors, by bond, with sureties, if required by the commissioners, and that "every such bond given by way of such security as aforesaid shall be prosecuted by such commissioners on any failure or default by the collector:" provided always that "no such bond shall be *put in suit* against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands and goods of such collector, in pursuance and by virtue of the *directions and powers* given to the respective commissioners by this act." These directions and powers are contained in section 52, by which, in case of default by a collector in paying the money received by him, the respective commissioners, or any two of them, in their respective jurisdictions, are *empowered and authorized* (not *required*) to imprison his person, and seize and secure the estate, both real and personal, belonging to him, or which shall descend or come to the hands or possession of his heirs, executors, or administrators, wheresoever *the same can be discovered and found*; and the commissioners who shall seize and secure the estate, shall appoint a time for a meeting of all the commissioners, who are *empowered and required* to sell and dispose of the collector's estate, to satisfy the arrears and costs, if the collector does not pay.

These being the material provisions of the statute, it seems to me—first, that, according to their true construction, it is discretionary in

the commissioners whether they will seize or not; and that, if they do not choose to seize, they may put the bond in suit; and that the proviso does not operate unless they do seize;—and, secondly, that, if the proviso be obligatory on the commissioners *in all cases*, it does not constitute a condition *precedent*, but is directory only.

The fifty-second section, of which I have stated the substance, appears to me to leave it clearly in the discretion of the commissioners whether they will seize the estate or not: they have the power of determining whether it is worth while, considering the nature of the property, its probable value, and the difficulty and expense of obtaining and converting it, to put in force the power of seizure. The proviso, therefore, in the thirteenth section, which expressly refers to the directions and powers in the fifty-second section, and which are discretionary, ought to be read just as if the former section had provided that the bond should not be put in suit for any deficiency other than such as remained after sale of the estate, real and personal, pursuant to the discretionary power vested in the commissioners by the fifty-second section; that is, “if the commissioners should think fit, in their discretion, to seize the estate, real and personal.” If this is not done, this consequence will follow—that the commissioners, who have a discretion by the fifty-second section, and that, no doubt, for the benefit of the parish at large, and the public and all persons interested, to seize or not, are yet compellable to do so, under the penalty of not being able to sue on the bond for the deficiency if they do not: so that, if they in their discretion think the public interest and the interests of all best consulted by not incurring the expense of a seizure of property of no value, the public must suffer by losing the remedy on the bond against the sureties; for, it is in truth their loss. If the commissioners took this bond and were acting for their own benefit, there might be some reason for saying, that, if they did not choose first to take the estate of the principal, they should not sue the surety; but, if they act, as they do, not for themselves, but for the public, it appears to be impossible to preserve the discretion given by the fifty-second section, without qualifying the thirteenth section, and making the proviso therein a contingent direction or order not to sue, if the discretion should be exercised, until the sale should have been completed. I am, therefore, of opinion, that this proviso in the thirteenth section has no operation, unless the commissioners choose to seize under the powers of the fifty-second section.

But, if this construction be not correct, and the proviso is obligatory on the commissioners in all cases, then arises the other question—Is the compliance with the enactment a condition precedent, and the non-compliance a bar to the action? I must say that I am of opinion, that it is not. In the first place, the language of the proviso is, not that no action shall *lie* or be *maintained* on the bond, but it comes by way of qualification on the former part of the clause, which commands the commissioners to prosecute the bond on any failure or default. It is, therefore, a command to them not to put the bond in suit in this particular case contemplated by the proviso; but it is no more. Had the legislature intended to make the non-compliance with this regulation an absolute bar, I cannot help thinking they would have used different language. But it is not on the use of the precise expressions that I place so much reliance, as on the consideration of the consequences to which the construction contended for would lead. If we construe the

words literally, and say, therefore, that no action is maintainable unless they seize and sell the lands and goods of the defaulter, whether they have knowledge, or by reasonable inquiry could obtain the knowledge of them or not, no action could be safely brought; and the public, whose suit it is, would be defeated of their remedy by proof of the collector having any interest whatsoever, in possession or reversion, however remote, in lands, or any goods, however small in value, (and there is none, however poor, who has not some,) in any place within the jurisdiction of the commissioners, or even without it; for, it may be made a question whether, under the fifty-second section, their power does not extend to lands and goods anywhere. This construction would operate practically to defeat the remedy of the bond altogether. The consequences, therefore, to which such a construction would lead, at all events would require some implied exception in the provision of the statute; and it is, I understand, conceded by many of my learned brethren that it cannot be a condition precedent in *all* cases. If the commissioners have notice or knowledge of the existence of such lands or goods, it is said that the sale must be a condition precedent, otherwise not: but, if so, can we say, that, if they could with *reasonable diligence* ascertain their existence, the sale should not in that case also be a condition precedent? There is a difficulty in drawing a distinction between the two cases; and much difficulty also in determining the fact of knowledge or of the power to ascertain the existence of lands or goods. Is such knowledge or power of *one* of the commissioners, a somewhat numerous body, to be sufficient? These inconveniences and difficulties, coupled with the want of a direct and positive enactment that the sale shall be a condition precedent, induce me to think that the proviso (if not discretionary, of which I have said enough) was directory only to the commissioners who act, to take all proper steps in the first instance. It does not follow, because it is directory, that it is not obligatory; and I conceive, that, for the non-compliance with that proviso, there would be a remedy either at law or in equity; though the want of such remedy would not, as it seems to me, necessarily prevent the clause from being construed to be directory.

For these reasons, I cannot help thinking that the legislature did not intend the proviso in question to be a condition precedent, or that the existence of lands or goods unsold should, under any circumstances, be a bar to the action.

3. My answer to the second question which your lordships have proposed, includes an answer to the third. For the reasons I have given before, I think that it is no defence to an action on the bond, that the commissioners did not seize and sell lands or goods of the defaulter, of the existence of which they had no knowledge, before the commencement of the suit.

4. To the fourth of your lordships' questions, my answer is, that in the case supposed, the verdict ought to be entered, on the issue raised by the rejoinder for the defendant.

The plea set out is in substance, (in as far as it is material to state it,) that the collector performed so much of the condition of the bond as relates to the receiving all the moneys assessed from the persons liable; and, as to his deficiency in accounting for what he received, that he was possessed of and entitled to divers lands and goods as of his own property within the jurisdiction of the commissioners, of which the plaintiffs had

notice, and which lands and goods still remain unsold. The replication to this plea is, that the collector, after this breach of the condition, had no lands within their jurisdiction which the commissioners could seize and sell, of which they had notice. The rejoinder drops all mention of the notice, and simply avers that there were lands which the commissioners could and might have seized and sold; and concludes to the country; and the plaintiffs add the *similiter*. I think this issue was, for reasons I shall afterwards give, wholly immaterial, or rather, in reality, no issue at all; and if a Court of Error had a power to award a repleader, it ought to award it: but I think the jury ought, upon the fact found, which is that there were lands which the commissioners could have seized and sold, to have found for the defendant, for that is the averment he makes in tendering the issue.

5. But, supposing the verdict to be so entered, then, upon the supposition contained in your lordships' fifth question, I am of opinion that this was an immaterial issue, upon which a repleader ought to have been awarded, (confining my opinion at present to the question on the plea set out, and the pleadings arising out of it,) if the Court of Error had power to do so; but that judgment *non obstante veredicto* cannot be entered for the plaintiffs.

The principle upon which such a judgment proceeds as against a defendant is, that he has confessed the plaintiff's action, and avoided it by matter which is in *substance* no answer to the plaintiff's action; and, in such a case, although the issue raised upon that matter has been found for the defendant, yet the Court gives judgment for the plaintiff as upon a *confession*. There are four descriptions of judgments for a plaintiff—on verdict, demurrer, *nil dicit*, and confession: *Rex v. Philips*, Str. 394; and this belongs to the last, and is classed under that head; and all the cases in the books which I have been able to find, are founded on that principle. Thus, in the form referred to by my brother COLTMAN, [14 Viner's Abridgment, *Judgment*, (D), pl. 1,] the judgment proceeds upon the confession in the plea of the matters in the declaration, and want of sufficient matter in bar. The same in Carthew, 372, 2 Rolle's Abridgment, 99, Willes, 365, 366. The cases of *Lacy v. Reynolds*, Cro. Eliz. 214; *Rex v. Philips*, Str. 394; *Drayton v. Dale*, 2 B. & C. 293, (9 E. C. L. R. 91,) 3 D. & R. 534; *Earl of Lonsdale v. Nelson*, 2 B. & C. 312, (9 E. C. L. R. 96,) 3 D. & R. 556; *Lambert v. Taylor*, 4 B. & C. 138, (10 E. C. L. R. 293,) 6 D. & R. 188; *Clears v. Stevens*, 8 Taunt. 413, (4 E. C. L. R. 153); *Lewis v. Clement*, 3 B. & A. 704, and *Rickards v. Bennet*, 1 B. & C. 223, (8 E. C. L. R. 63,) 2 D. & R. 389, are all cases of judgments on pleas in *confession and avoidance*, bad in substance: (for, if bad in *form* merely, such a judgment will not be given :) *Staples v. Heydon*, 2 Lord Raym. 924, 6 Mod. 10, 2 Salk. 579, 3 Salk. 121. And, after a very diligent search, I have not been able to discover a single case of this species of judgment on any other pleas than those which are technically in confession and avoidance.

It is said that, if a plea traverses one out of several matters alleged in the declaration, it confesses the remainder to be true; and in like manner the rejoinder confesses such part of the replication as it does not deny. But I do not think it *confesses* the remainder in the sense which is required to found such a judgment; *Hudson v. Jones*, 1 Salk. 91. That which is traversable, and not traversed, may be said no doubt to be admitted for some purpose: that is, it cannot be made a matter in

dispute on the trial; and if it were taken by protestation under the form of pleading before the new rules, the matter would have been equally put out of the issue; but there would have been great difficulty in maintaining that this was a *confession* for the purpose of giving the plaintiff judgment. The effect of a traverse of one fact out of many is merely this, that the party pleading rests his defence on a denial of that fact only; but, if the decision of it in favour of the defendant turns out to be immaterial, I conceive the Court cannot give judgment as on a confession of the other facts. I am fortified in this opinion, not merely by the absence of any authority to warrant such a judgment, but by some cases of a similar nature, in which the Courts have decided that a *repleader* ought to be awarded. For, if the position be true, that a defendant confesses that fact in a declaration or replication which he does not deny, it must be equally true of a plaintiff denying one matter which is immaterial out of several matters in a good plea; and yet, in this case, Lord Holt says, in *Pitts (or Witts) v. Polehampton*, 3 Salk. 305, 1 Lord Raym. 391, there must be a *repleader*. In *Serjeant v. Fairfax*, 1 Lev. 32, (*Sarjant v. Madox*), 1 Keble, 23, which was an action of debt for rent against the assignee of the lessee, (as it seems from the latter report,) the plea was, that the defendant assigned over to a stranger, with the consent of the plaintiff; and the issue was on the consent; and, after verdict, whether for the plaintiff or defendant is uncertain, a *repleader* was awarded. The case is reported several times in Keble, and this appears to be the result; but I must own that no great weight ought to be attached to this authority, from the inaccurate mode in which it appears to have been reported. In a recent case in the Exchequer, *Plummer v. Lee*, 2 M. & Welsby, 495, 5 Dowl. 755, the Court decided that, where the defendant traversed an immaterial averment, there could not be judgment *non obstante veredicto*, but that there must be a *repleader*.

For these reasons, I cannot help thinking, that, if the replication in this case *had averred two distinct facts*, and the rejoinder had traversed one which was immaterial, and was found for the defendant, it would not have *admitted* the other, so as to warrant a judgment *non obstante veredicto*. But, even if it were so, the doctrine would not apply to such a case as this; for, here, in truth, the issue is *immaterial*—one on which no judgment can be given; not because an immaterial fact is traversed, but because there is in reality no issue at all, no affirmance on one side of the same proposition which is denied by the other: and the case belongs to a numerous class of immaterial issues which are to be found in the books, where issue is taken by one party on that which is not alleged by the other. I would instance the cases of *Enys v. Mohun*, Str. 147, 1 Barnardiston, 182. 220, which was an action against the assignee of a lease, to whom the estate of a lessee had come by assignment, and the plea was that the lessee did not assign to the defendant; and, after issue joined, a *repleader* was awarded, it being an issue joined on what was not alleged in the declaration: and the cases in Gilbert's C. P. 48, *Sandback v. Turvey*, Cro. Jac. 585, and *Walker v. Brook*, 1 Lord Raym. 133, all afford instances of the same kind. In the present case, the replication is, that the collector had not any lands of which the commissioners had notice; which pleading is bad on special demurrer, as being a negative pregnant, that is, an issue that rather supposes an affirmative than the contrary; but good after verdict; Gilb.

C. P. 153. If the replication had been proper, it should either have denied that there were lands, or admitted that there were, and averred that the commissioners had no notice of them: but this informal replication does not deny that there were lands, nor does it admit that there were; but it means in effect this—*either* that there were no lands, *or*, if there were, that the commissioners had no notice of them. The rejoinder contains no answer to this proposition, but avers simply that there were lands—a fact that was never denied by the plaintiffs; and on this ground I am satisfied that this is a purely immaterial issue, (more properly, no issue at all,) which is not cured by verdict, upon which no judgment can be given, and for which, in the court below, a repleader ought to have been awarded.

6. In answer to the sixth question proposed by your lordships, I have to state, that, in my opinion, it is not competent for a Court of Error to award a repleader. Upon this point we have the express authority of Lord Hale—*Bennet v. Holbeck*, 2 Saund. 319 a, 2 Lev. 12, (*Holbeck v. Bennet*),—who said that course had been disused then 100 years, and could not be practised. To the same effect is *Crosse v. Bilston*, 6 Mod. 103: and I believe no instance can be found in recent times of such a proceeding. The reason for this probably is, that the authority given by the writ of error is confined to giving judgment, whether of reversal, affirmance, or *venire de novo*, on the existing record; and that the parties are not before them to replead. They have no day in court, and are not necessarily present when the judgment is pronounced. The defendant in error has the means of compelling the plaintiff in error to assign errors, by *scire facias quare executionem non*; and the plaintiff in error may oblige the defendant to appear and join in error, by *scire facias ad audiendum errores*; or the defendant may come freely: but, this done, the record in error does not usually state the presence of both parties when judgment is given; and judgment may certainly be affirmed in the absence of the defendant, as is stated by POWELL, J., in *Staple v. Heydon*, 6 Mod. 9. Be this as it may, there is no doubt but a Court of Error does not now possess that power. If a Court of Error could award a repleader, I think it ought to do so in this case.

7. I think the answer to the seventh question proposed by your lordships ought to be, that the judgment should be for the plaintiffs, *non obstante veredicto*, on the ground that the plea set out confessed the right of action on the bond, and did not avoid the same by sufficient matter—that is, that the judgment should be affirmed. But if I am wrong in supposing that the sale of the lands was not a condition precedent, then I am of opinion that the judgment for the plaintiffs below ought to be reversed simply: and they must begin *de novo*. I do not think that any aid can be lawfully derived from the other pleadings in *this case*, though I am not prepared to say that it may not in some cases. It was said in *Goodburne v. Bowman*, 9 Bingh. 471, (23 E. C. L. R. 369,) 2 M. & Scott, 713, and very truly, that “most of the cases in which the question respecting a repleader has been considered, were before the statute of Anne, when only one plea could be put upon the record;” and that, “if such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied.” The lord chief justice proceeds to state that, in that case, there was “a verdict upon the general issue; and that, although, in considering the merit or demerit of any individual plea, recourse cannot be had to another,

unless expressly referred to by such plea; yet, as the application to enter the verdict is founded upon the whole record, upon which it appears that the defendants have committed the grievance complained of, and have not shown any sufficient justification, it may be considered that, in that point of view, there is enough to warrant the application"—for judgment *non obstante veredicto*: and that "no rule is better established than this, that the Court will not grant a repleader, except where complete justice cannot be answered without it:" and he cites *Symmers v. Regem*, Cowp. 310.

This doctrine so laid down by the chief justice is, I believe, new. At first, I felt considerable doubt as to its being well founded: but it is extremely convenient and reasonable: and I am not prepared to say that any valid objection can be made to it, provided it be explained and qualified in the manner I will mention: but unfortunately that qualification will exclude the present case. Where it applies, a new mode of entering up the judgment upon the record would be required, treating the issue found for the defendant as immaterial, and proceeding notwithstanding the verdict on that issue to give judgment upon the other issue found for the plaintiff: nor am I satisfied that the doctrine laid down by the chief justice would not apply to a case in which the other issues, one or more, being each material and decisive of the whole cause of action, are each found for the plaintiff, although they severally or together did not confess or traverse *all* the material facts alleged in the declaration; for, it may be well said that a repleader is to be granted, to enable the parties to plead properly such a plea as would be decisive of the action; and, if they have already done so, under the power given by the statute of Anne, and raised one or more correct issues, each of which would decide the action, and the Court may give judgment on the finding on the material issue or issues, such a course is unnecessary: and I am disposed to think, on that ground, after full consideration, that the Court of Exchequer was wrong in awarding a repleader in the case of *Plummer v. Lee*, already referred to; although it would have been rightly awarded, if the only plea had been the traverse of the immaterial fact alleged in the declaration. But I am of opinion that this doctrine will not help the plaintiffs in this case; because the matter of the plea in question *has never been tried at all by a proper issue*. The defendant had liberty to plead that plea, and has a right to all the benefits of it; and, if it be good in point of law, (which for this purpose I must assume,) he had a right to have the facts properly disposed of by a proper issue. This has not been done; as the issue was found in his favour, he would have a right to ask for a repleader if the plea stood alone, and cannot be deprived of that right if it is joined with others.

I am, therefore, of opinion, that, assuming the plea in question to be good, the other pleadings would not help the plaintiffs, and the judgment ought to be reversed.

VAUGHAN, J. I have considered with attention the various questions which in this complicated case your lordships have propounded to the judges; some of which, being "*inter apices doctrinæ placitandi*," might be expected to provoke much difference of opinion. I have found great difficulty in bringing my mind to a satisfactory conclusion upon some of them, which may cease to be matter of surprise when it is remembered, that, after the most anxious consideration, not

only have different judges taken different views of the same questions, but the same judges, after much ruminating, have found themselves constrained to give different judgments upon the same question, as the case has proceeded through its several stages in the courts below.

1. To the first question, which appears to be the most easy of solution, I answer that the conduct of A. B., under the circumstances stated, in paying over to the Receiver-General any part of the moneys collected by him for the year 1828, to be applied to the service and account of former years, was a direct breach of the condition of the bond. But, as the case of a surety has ever been regarded with favour both in Courts of Law and Equity, his liability must be demonstrated. He has executed a bond with a condition by which he stipulates, that A. B. being appointed collector of the taxes for the district in question for the year 1828, he will be responsible for his collecting and well and truly paying over to the Receiver-General, all such moneys as shall come to his hands by virtue of the assessments of *that* year. True it is that A. B. did faithfully collect all the sums due upon those assessments, and did pay them over to the Receiver-General; but with a specific appropriation of part, viz. 693*l.*, to the account and service of a *former* year, for which year the defendant below was not his surety.

Adverting to the provisions of the act 43 G. 3, c. 99, (so often referred to,) which creates and defines the obligations and duties of the collector and of his surety, I am of opinion that A. B. thereby incurred a forfeiture of the penalty of the bond. But, in looking at the general frame and context of the act of parliament, one cannot fail to observe that the duties and the responsibility of the collector and his surety are several and distinct, expressed in different terms, and depending upon very different provisions. The office of each is an *annual* office; and, in considering the questions submitted to us, we must carefully avoid confounding the duties of these respective officers for *any one* particular year, with the duties of any prior or subsequent year. It may happen accidentally, but not necessarily, that the collector of the preceding year may also be appointed collector for the subsequent year; and that the surety of the former year may chance to become the surety for the collector of the following year; and so *vice versâ*. The principal, or collector, engages that he will duly collect, and well and truly pay over to the Receiver-General, all sums received by him by virtue of the assessments made in the year 1828, to the service and account of *that particular year*; and the surety becomes responsible for the faithful discharge of this duty: but, if, instead of paying over the sums collected in 1828 to the service and account of *that* year, the collector causes the same, or any part of them, to be applied to the extinction or liquidation of an arrear which he had suffered to accumulate in any former year, I have no hesitation in declaring that he becomes as much a defaulter, to the extent of such misappropriation, as if he had applied the money to the payment of his own private debt; and *pro tanto* the parish becomes liable to be reassessed to make good such deficiency, and may resort to the surety for indemnification to the extent of the default. Whether this conduct of A. B. amounted to a breach of the condition of the bond, cannot, in my humble judgment, be tried by a more infallible test than that suggested by my brother PARKE, in delivering his judgment in the Exchequer Chamber, 2 New Cases, 33

2 Scott, 46, wherein he observes that the condition of the bond is to be construed as if *another* person, and not A. B., had been collector for a former year: and, could it then admit of any doubt that it would be a breach of the condition "to pay well and truly to the Receiver-General," if the money had been *lent* by A. B. to such former collector to enable him to pay his arrears, although the money had been so applied? It is, in effect, for this purpose, an appropriation by A. B. to the payment of *his own debt*. To my mind, this proposition involved in the first question appears so plain, and so directly in unison with the opinions (I believe) of all the judges, (whatever difference may be found to exist in the answers to be returned to some of the subsequent questions,) that I cannot prevail upon myself to waste more of your lordships' valuable time upon the consideration of it.

2. The second question opens a more extended field of discussion, and is calculated to excite much greater difference of opinion. We are told that A. B., at the time of the supposed breach of the condition of the bond, had certain lands and goods within the jurisdiction of the commissioners, *of which they had knowledge*, before any action brought upon the bond; and we are asked whether, an action being brought, it would be a defence to that action, that the commissioners did not before suit seize and sell the said lands and goods.

The answer to this question seems to depend upon establishing the proposition that such seizure and sale was a condition precedent which must be complied with before the surety can be sued; and whether it be such a condition precedent must be determined by the true construction of the proviso in the thirteenth section of the 43 G. 3, c. 99, regard being had, at the same time, to the power and authority given to the commissioners by the fifty-second section to deal with the person and property of the collector making default. It has been argued, and I think correctly, that the clause enabling the commissioners to seize the lands and goods of the collector, is not *imperative*, but *directory only*, and is not a step necessarily preliminary to putting the bond in suit against the *principal*. But I conceive that the legislature has drawn a distinction, and expressed it in words too plain to be mistaken, between the liability of the principal and of the surety, and has with the most guarded caution placed the responsibility of the latter upon the more favoured footing. After directing the form of the bond to be taken from the surety, that section (s. 13) proceeds to enact, that "every such bond given by way of security shall be prosecuted by the commissioners on any failure or default of the collector:" but accompanied and followed by this remarkable proviso, which I regard as the inducement or consideration influencing the mind of the surety to enter into the obligation, viz. "Provided always that no such bond shall be put in suit against *any surety* for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector in pursuance and by virtue of the directions and powers given to the respective commissioners by this act." If this proviso admitted on all hands to have been introduced for the sole purpose of giving protection to the surety, and of easing the burden of *his* obligation, does not disarm the commissioners of any power to call *him* to account until the deficiency of the collector has been ascertained, after giving credit for the proceeds resulting from the sale of his lands and goods pursuant to the powers in the fifty-second

section, in reduction of the balance, I ask what language could be devised more clear to convey the notion of a strict condition precedent than the words of this proviso. To my mind, this is a solemn declaration made by the legislature, (contemplating the reluctance with which persons might become sureties in bonds of this description,) that whoever executed them should not be prosecuted for the default of the collector, until after the commissioners had first seized and sold all the real and personal estate of the collector of which they had any knowledge; and that the commissioners, having given credit for the proceeds in reduction of the debt, might then, and then only, enforce the bond against the surety. How far the neglect or failure of the commissioners to exercise the powers delegated to them of proceeding against the lands and goods of the principal, for the purpose of making them available in diminution of the debt or balance to be afterwards claimed against the surety, may render them obnoxious to any proceeding by mandamus, or by suit in equity, or otherwise, we are not called upon to discuss: but, surely, their neglect to discharge the trust reposed in them affords no just ground for prematurely accelerating the liability of the surety. So harsh a construction of the proviso in the thirteenth section would be fraught with injustice, and virtually operate as a fraud upon the surety. I am, therefore, of opinion, upon the plain letter of the act of parliament, upon the clear intention of the legislature, to be collected from the whole frame and spirit of its various enactments, and upon the reason of the thing, that the neglect of the commissioners to seize and sell the lands and goods of the collector of which they had knowledge, before the action was commenced, would, if properly pleaded, afford a good ground of defence to such action.

3. To the third question, which assumes the want of knowledge in the commissioners, and their ignorance of the fact of the existence of any lands or goods belonging to the collector within their jurisdiction, before the commencement of the suit, I answer, *De non existentibus et non apparentibus eadem est et ratio et lex*. Upon this short ground, and on this plain and sound principle, I am of opinion, that this defence of the surety must fail, where the commissioners have had no notice.

4. Whether the issue raised by the rejoinder to the replication to the plea set out ought to have been found for the plaintiffs or for the defendant, depends upon the matters involved in that issue. If the rejoinder, not having traversed the fact of *notice* to the commissioners, a most important part of the issue tendered by the replication, can be considered as having the legal effect of *impliedly* admitting the want of notice to the commissioners of there being any lands, &c. of A. B. within their jurisdiction before the commencement of the action, I think that the verdict on that issue should have been found for the plaintiffs. But I cannot satisfy my mind that the defendant below, by his rejoinder, can be taken to have made any such admission. The allegation in the replication that the commissioners sold all the lands of A. B. of which they had notice, is *one entire* and substantive allegation, the *whole* of which the defendant might and ought to have traversed; but, by omitting one very essential part of it, he has raised an immaterial issue, (if any issue be raised,) in which I think the fact of notice not involved. Taking this view of the subject, the finding of the jury that A. B. *has lands*, &c., properly affirms all that was put in issue, and therefore entitles the defendant to have it entered in *his* favour; but, as it is an

immaterial issue, what are the legal consequences resulting from such finding of the jury, will be seen in the answer to the subsequent questions.

5. If I am correct in supposing that the verdict should be entered for the defendant upon the issue raised by the rejoinder to the plea in question, and that it would be no defence to the action that the lands of A. B. were not sold by the commissioners, unless they had notice of their existence, I think that judgment might be entered for the plaintiffs *non obstante veredicto*, provided the plea can be considered as amounting to a *confession* of the cause of action, and an *insufficient avoidance* of it. The rule as applicable to cases of this description is laid down with great precision and perspicuity by Lord Chief Justice ABBOTT, in *Lambert v. Taylor*, 4 B. & C. 152, (10 E. C. L. R. 293,) 6 D. & R. 188. He says: "The plea being bad, the defendant certainly cannot have judgment, although the issue is found for *him*, the issue being taken on an *immaterial* matter: and the question whether the plaintiff can have judgment, or whether there ought to be a *repleader*, (supposing the Court competent to award a repleader,) depends upon the question whether the plea does or does not contain a confession of a cause of action, if a cause of action be confessed by the plea, and the matter pleaded in avoidance be *insufficient*, the plaintiff is entitled to judgment, *notwithstanding* the verdict. The same rule was recognised and confirmed by the Court of Common Pleas in the case of *Goodburne v. Bowman*, 9 Bing. 532, (23 E. C. L. R. 369,) 2 M. & Scott, 700; and by the Court of Exchequer, in *Plummer v. Lee*, 2 M. & Welsby, 495, 5 Dowl. 755.

Let us apply this test to the plea in question. That plea states that A. B. did well and faithfully demand and collect all the sums of money charged in the said assessments; and then avers that he was possessed of and entitled to certain lands within the jurisdiction of the commissioners, *of which the plaintiffs had notice*, and which they might have seized and sold to satisfy the sums so collected and detained or not duly paid over by him in pursuance of the bond. This plea confesses a cause of action, and contains matter in avoidance of it, capable of being moulded into an issue which, properly framed, would have determined the merits of the case. But, mark the mode in which the plaintiffs deal with this plea in their replication. They state, that, after A. B. had collected the sums assessed, and omitted to pay them over to the Receiver-General, he had no lands within the jurisdiction of the commissioners which they could seize and sell, *of which the plaintiffs had notice*. Without discussing the question whether the plaintiffs' replication was not inartificially drawn, and open to a special demurrer, inasmuch as it traverses, not the single fact whether A. B. had lands within the jurisdiction of the commissioners, nor the fact, simpliciter, *whether the plaintiffs had notice*, but the compound proposition that he had *no lands of which the plaintiffs had notice*, perhaps the more correct mode of replying to a plea so framed would have been either to have traversed the fact of A. B. having lands, or the fact of *the plaintiffs having had notice*—the one or the other, but not both; the failure to maintain either being fatal to the defendant's bar.

Such being the plea and the replication, the defendant rejoins that A. B. had lands within the jurisdiction; omitting to traverse so essential a part of the issue tendered by the replication as the fact of *notice*. It

appears to me that the plaintiffs might have demurred to this rejoinder, as tendering an immaterial issue, (if not amounting to a departure,) passing by and losing sight altogether of the fact of notice, upon which the strength and sufficiency of the bar rested. Instead of doing so, they have countenanced this error, and concurred, by adding the *similiter*, in sending an issue to be tried by a jury, which cannot dispose of the merits of the case. How, then, is the verdict to be entered on this issue? With unfeigned deference to the opinion of others, I conceive, as I have before stated, that the verdict should be entered for the defendant, the jury having found the only fact involved in it in *his* favour, viz. that A. B. had lands within the jurisdiction of the commissioners.

There being, therefore, a plea upon the record which confesses a cause of action, and which contains matter in avoidance of it which might have determined the rights of the parties, but which has failed to do so from their mutual neglect to observe the rules of good pleading, I think the plaintiffs are not entitled to enter up judgment *non obstante veredicto* upon a supposed *implied* confession in the rejoinder, that, if there were lands within the jurisdiction of the commissioners, the plaintiffs had no notice of them. For the other reasons suggested by my brother COLERIDGE and the very learned Baron PARKE, I agree that the neglect of the defendant to traverse the fact of *notice*, does not amount to any such implied admission of it.

6. Supposing the judgment could not be so entered, and the issue raised by the rejoinder be (as I apprehended it must be adjudged) *immaterial*, we are called upon to declare our opinion upon the jurisdiction of a Court of Error to grant a repleader, and upon the expediency of doing so in the case before us. I believe it has been a prevalent notion in Westminster Hall of late years, that a Court of Error cannot award a repleader; and the neglect or forbearance to exercise this right through a long succession of years, is strong evidence against the existence of it. Since the statute of Anne, which allowed defendants any number of pleas the Court might be pleased to sanction, and since the practice of granting new trials has grown into daily use, the awarding of a repleader, even by the Courts below, has become of rare occurrence, inasmuch as the Court from whence the record issues is likely to render such proceeding unnecessary. In the case of *Bennet v. Holbech*, 2 Saund. 319 a, (*Holbech v. Bennet*, 2 Lev. 12,) Lord HALE is reported to have said that, in ancient times, it was usual to award a repleader on a writ of error from the Common Pleas to the King's Bench, and that he had searched and found several rolls, not less than seven in number, (the earliest in the 21 Edw. 1, and the latest in the 33 Edw. 3,) in which a repleader had been so awarded; but he adds, it was grown obsolete and not in use at that day. I am not aware that the jurisdiction of a Court of Error to award a repleader (assuming it once to have existed) has ever been abolished by any legislative enactment, or declared illegal by any judicial decisions. But, since the time of Lord HALE, more than a century and a half has elapsed, and sunk the practice (if ever it existed) into absolute desuetude, and involved the right in deeper obscurity. I cannot, therefore, venture to affirm the jurisdiction of a Court of Error to award a repleader, and consequently cannot assert the expediency of doing so in this case.

7. This leads me to the last, and the only remaining question, viz., what judgment ought to be pronounced, supposing a Court of Error

cannot or do not award a repleader: to which I answer, in a word, that judgment cannot be pronounced for the defendant, because the issues found for him are immaterial issues: neither, as it appears to me, can judgment be pronounced for the plaintiffs on the whole record, or on the fifth plea *non obstante veredicto*, for the reasons I have before stated.

Deeply regretting the time and cost which have been expended in a fruitless litigation, I come to the conclusion which I have arrived at, after much fluctuation of opinion, with great reluctance, that the judgment of the Court below should be reversed, and the plaintiffs be at liberty to retrace their steps, and begin *de novo*, if they shall be so advised.

LITLEDALE, J. 1. In answer to the first question proposed by your lordships, I am of opinion that the conduct of A. B. was a breach of the condition of the bond, for the reasons already given by my learned brothers.

2, 3. The second and third questions are so much connected together, that, with the leave of the House, I should propose to give an answer which applies to both.

Two questions arise on the construction of the statute of 43 G. 3, c. 99. The first is, whether the sale of the lands and goods of the collector be a condition precedent to putting the bond in suit against the surety: the second is, whether, if it be a condition precedent, it applies to all the lands and goods of the collector, or only to those which were *known* to the commissioners; and I use the term "*known*," because the word "*notice*," which occurs in the pleadings, sometimes means that knowledge which is acquired by specific information given with a particular object, as in the instance of notice of dishonour of bills of exchange, and other cases; but, as applicable to the present case, I mean by the term "*known*," *knowledge*, in whatever way it is acquired.

2. Upon the first of these points, I think the sale of the lands and goods of the collector is a condition precedent to putting the bond in suit. The thirteenth section of the 43 G. 3, c. 99, after prescribing the form of the bond of the surety, says, that "every such bond given by way of such security as aforesaid, shall be prosecuted by the commissioners on any failure or default of the collector:" and then there immediately follows this proviso, "Provided, always, that no such bond shall be put in suit against any surety, for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector in pursuance and by virtue of the directions and powers given to the commissioners by this act." Here, therefore, is a provision that the bond shall not be put in suit for any deficiency other than what shall remain unsatisfied after a particular thing done. It is quite clear that, if the lands and goods had been sold, the bond can only be put in suit for the difference; but, if there are lands and goods, and they *can* be sold by the commissioners under the powers and directions of the act, the meaning of the clause is, that the deficiency must be ascertained first; for, otherwise, it is putting the bond in suit for the *whole*, where the act says it shall only be so for a *deficiency*. It is a very reasonable provision for a surety, that he shall not be called upon until all has been got from the collector that can be raised.

But it is necessary to see what are the powers and directions given

by the act, by which the deficiency is to be ascertained. They are contained in the fifty-second section, which enacts that, if the collector makes default in the particulars enumerated, the commissioners are authorized and empowered to imprison the person, and seize and secure the estate, both real and personal, of the collector, whosoever the same can be discovered and found; and the commissioners who shall so seize and secure the estate, shall be and they are empowered to appoint a time for a meeting of the commissioners; and the commissioners present at such meeting, in case the accounts of the collector be not delivered, or the money detained by him be not paid, are empowered and *required* to sell and dispose of all such estates which shall be for the cause aforesaid seized and secured. It is said that this clause as to seizing the estates is only directory to the commissioners, as they are only authorized and empowered, and not *required*, to seize; and that this is more strongly shown, because in the subsequent part of the clause they are *required* to sell, and, therefore, a different phraseology is used. There is not the least doubt but that the clause as to seizing is only directory, and only gives a discretion to the commissioners, that if the collector makes default, they may seize and secure the estates; and then, if, at a subsequent meeting, the collector does not pay up his deficiency, they are *required* to sell. It is very reasonable that they shall not be *required* to sell, if the collector can redeem his estate. And then, it is said, that because the clause as to seizure is only discretionary with the commissioners, they need not seize unless they think proper; and, as the powers and directions as to the seizure and sale of the estates are not in point of fact exercised, and need not be so unless the commissioners think proper, the deficiency, after the exercise of these powers, is out of the question, and does not and need not arise, and the bond may be put in suit without regard to that. But I think not. The fifty-second section relates to the conduct to be pursued towards the *collector*; and the commissioners will no doubt exercise their discretion as will best accord with the discharge of their duties to the crown, to the parishioners, and to the collector; but, if they do not think it right to enforce their powers, the sureties are not to suffer by that; the proviso in the thirteenth section is introduced for the benefit of the surety, and the meaning of it, in my opinion, is, that he is not to be called upon until the commissioners have done all in their power to make the collector pay; and if, for any reason, they omit to do that, they are not to call on the surety. If it be not a condition precedent, I do not see how the surety can have the benefit of the clause; for, if the surety be compelled to pay the whole, I do not think he could have a mandamus to the commissioners to seize and sell; their power is only to seize and sell if the collector has not paid the money; but, if the money has been paid by other means, the collector is no longer indebted to the commissioners: besides, if a mandamus were to go, it must be for the whole direction of the clause, and that is, that the money arising from the sale shall be paid to the Receiver-General; and then the surety would have to petition the crown to be repaid. And I should doubt whether a Court of Equity would compel a sale, unless to carry the whole clause into effect, and so as that the surety might petition to the crown when the money had got into the hands of the Receiver-General. Perhaps, the commissioners might of themselves sell, in order to relieve the surety:

but, besides my doubting the power of the commissioners to sell after they have been paid by the surety, I do not think the surety ought to be put in the situation of having to rely upon what they may be disposed to do.

It is very possible that some inconvenience, and in some cases loss, might arise if the bond could not be enforced against the surety till the property of the collector is sold; for, certainly, the proceedings under the fifty-second section must be attended with delay. But I do not think we have any thing to do with that consideration; the question is upon the construction of the act, as it is presented to us.

Some distinction was raised in the argument as to the meaning of the words "prosecute" and "put in suit;" and it was suggested, that because the words "prosecute the bond" were used without any restriction, the bond might be enforced by action immediately. But I think "prosecute" and "put in suit," are synonymous: in pleading a writ, the common phraseology is, *sued and prosecuted* out of the court, &c.: and, if the word "sued" alone, or "prosecuted" alone, were used, it would mean the same thing as conjoining the two words; and in the thirteenth section the restriction, I think, must be applied as well to prosecuting the bond as putting it in suit.

3. The other question is as to notice or knowledge of the lands and goods;—as to which, there is more doubt; because there is no such language as notice or knowledge used in the act of parliament; but the construction of the act of parliament must have a reasonable intendment engrafted upon it, arising out of the existing state of things: and I think it can only be intended that the commissioners shall be compellable to seize and sell for the benefit of the surety such lands and goods as they know of; it is impossible for them to seize things of which they are ignorant; and it would not be any breach of duty in them not to seize lands of which they had no knowledge. If they were negligent in not taking reasonable means, according to circumstances, to find out the effects, it might furnish some means of proceeding against the commissioners; but, as a mere question of construction, whether they were bound as a condition precedent to seize that of which they had no knowledge, any acts of negligence or want of attention in that respect could not arise. I do not think the words "wheresoever the same can be discovered and found," apply to this part of the construction; and I think that means, wherever locally they can be found. The collector might have some small interest in public works and undertakings where there are a great number of proprietors, as to which the commissioners would have no means of obtaining information. So, also, an estate may have come to him as heir at law or devisee of a person who died the day before the bond was put in suit, of which the commissioners knew nothing; or, he might have a small quantity of goods in some obscure room; and many other cases might be put where knowledge of the fact of having lands or goods would be utterly impossible; and then, if knowledge were not made an accompaniment of the property, a very small amount of effects, under circumstances before stated, would prevent the bond being sued upon. I do not think that the question of hardship ought to influence my opinion either on one side or the other: but it may be observed that this construction does not seem to impose any great degree of hardship upon the surety; because, if he

looked after his own interests, a very little exertion would enable him to make himself acquainted at least with the material parts of the property of the collector; and, if he were afraid that the commissioners may not be very anxious to get the information themselves, it would be very easy for the surety to give distinct notice of the property to the commissioners—not that I mean, as I have before stated, that express notice need be given, for, if they have knowledge by any means whatever, that constitutes notice within the meaning of the word “notice” as used in these proceedings.

The result of these remarks on the second and third questions is, that, under the circumstances stated in the second question, there *would* be a good defence to the action; and that, under the circumstances stated in the third question, there would *not* be a good defence to the action.

4. As to the fourth question,—the replication to the plea set out, states that the collector had no lands within the jurisdiction of the commissioners which they could seize and sell of which they had notice, and that all the goods and chattels of the collector within the jurisdiction of the commissioners, and of which the plaintiffs had notice, were seized and sold. The rejoinder to this replication says that the collector had divers lands within the jurisdiction of the commissioners which they could and might have seized and sold, and that all the goods and chattels of the collector which could and might and ought to have been discovered and found by the commissioners were not seized and sold in pursuance of the directions and powers given to the commissioners by the said act of parliament, in manner and form as the plaintiffs had above in that behalf alleged, and of this the defendant puts himself upon the country. And the finding of the jury on the issue so tendered is—“And as to the issue above joined, the jurors say that the collector had lands or houses to him belonging of the value of 121*l.*, which could and might have been sold by the commissioners in pursuance and by virtue of the directions and powers given to the commissioners by the said act of parliament; and that the collector had also goods and chattels to him belonging, of the value of 200*l.*, which also they could and might have seized and sold in like manner, under and by virtue of the provisions of the said act.” Now, in this part of the finding, the issue raised in the rejoinder is found for the defendant. It is very true that the jury also find that the commissioners had not *notice* of the collector’s being possessed of the houses or lands, but they find that they had reasonable grounds for believing that he possessed the said household goods, which might have been seized and sold by them under and by virtue of the provisions of the said act of parliament, and that he absconded: but the other facts found on the special verdict as to this, are not put in issue by the rejoinder to the replication. And the findings as to that do not vary the finding of the issue on the facts alleged. And, therefore, in answer to the fourth question, I think the verdict must be entered for the defendant.

5. To the fifth question—I think the plaintiffs are not entitled to judgment *non obstante veredicto*. The plea in question states that the collector had lands and goods of which the commissioners had notice, and which were subject and liable to be seized and sold, and which might have been seized and sold, but which remained unsold by the commissioners. This plea, in my opinion, is a good answer to the action, unless it be impeached, and the effect of it taken away, by the subsequent pleadings: it confesses the bond, and avoids the effect of it.

The replication to this plea says that the collector had no lands which the commissioners could seize and sell, of which they had notice; and that all the goods of the collector of which the commissioners had notice were seized and sold. The rejoinder says, that the collector had lands which the commissioners might have seized and sold, and that all the goods of the collector which could and might and ought to have been discovered and found by the commissioners, were not seized and sold in pursuance of the directions and powers given to the commissioners by the said act of parliament, in manner and form as the plaintiffs have alleged.

Now, the plea being good, and the replication being also a good answer, a material point in dispute is tending towards an issue. But, when the defendant comes to rejoin, he drops all about the notice. Now, as notice is a material point, the rejoinder is bad, because it omits to put in issue a material point; and the rejoinder might have been demurred to: but the plaintiffs have not demurred, but they have joined issue upon a part which, taken simply of itself, is not sufficient to decide the merits of the case, and may be treated, not as altogether immaterial, because it is material whether the collector had lands; but, though material in part, it is not material to decide the case, but is rather to be treated as insufficient.

The cause is tried upon the issue so tendered and joined; and the verdict, if it is to be confined to the very words of the issue, is found for the defendant. But, as the plea itself is a good plea, I do not think the subsequent defects in the pleadings are to invalidate the plea to such an extent as to say that the plaintiff is entitled to a verdict *non obstante veredicto*. The cases where the plaintiff is entitled to such a benefit, are, where the plea to the action is insufficient: here the plea is sufficient; but the plaintiffs have not taken care to put the plea (if one may so express it) out of doors. If the rejoinder could be taken to be a confession of the want of notice, it might be contended that the judgment ought to be entered for the plaintiffs; because, if the defendant has admitted want of notice, then the finding of the jury that the collector had lands, when coupled with the confession of the defendant that there was no notice, would show that he had no defence. But, I do not think that the defendant can be taken to have confessed that the commissioners had no notice; for, the allegation that the collector had lands of which the commissioners had notice, is one entire allegation; and the notice is not alleged as a substantive thing; and I do not think that the dropping part of an allegation, when the other part by that means becomes immaterial, is to be an admission of what is so dropped.

6. To the sixth question—I think a Court of Error cannot award a repleader, for the reasons given by my learned brothers. If they could award a repleader, I think it would be proper to do so in this case.

7. To the seventh question—I see nothing to entitle the plaintiffs to judgment on the whole record. Whatever may be the case as to the other pleadings on the record, I think that, as to the seventh question, we are confined to the pleadings arising out of the plea set forth: and as I think that plea constitutes a good defence, and the plaintiffs have not taken care to get rid of it, but have gone to trial upon an immaterial issue, though the verdict must be entered for the defendant, yet no judgment can be entered upon it for the defendant; then, as, for the

reasons I have before given, I think the plaintiff is not entitled to judgment *non obstante veredicto*, I think that the judgment given by the court below must be reversed.

LORD BROUGHAM. My lords—This was an action brought on a bond in which the present plaintiff in error (the defendant below the surety for one Bigg, who was appointed collector under the 43 G. 3. c. 99, and other acts which that act consolidated and amended, namely, collector of assessed taxes for the parish of St. Matthew, Bethnal Green). The action was brought to recover the sum of 693*l.*, which was alleged to be due to the Receiver-General of the county of Middlesex, in consequence of Bigg not having paid in that sum to the account of the year 1828–9, for which it was received and collected by him, but to the account of the year immediately preceding, for which year Gwynne, the plaintiff in error, and defendant below, was not surety.

Many questions arose both in the court below, and afterwards in the Exchequer Chamber, upon the liability of the surety, and upon the pleadings in the cause. Upon the pleadings in the cause the question did not arise in the Court of Common Pleas, but in the first Court of Error into which the cause was brought, namely, the Exchequer Chamber. To the action upon the bond various pleas were pleaded, and various issues raised upon the pleadings, to which it is unnecessary that I should now call your lordships' attention: but much that I have to offer will turn upon the pleadings; and therefore to the state of the pleadings it will be my duty to direct the attention of your lordships. Suffice it at present to say that the issues joined were tried before Mr. Justice ALDERSON, when questions were put to the jury to the number of seven, to which questions they returned answers; and upon that, by consent, a general verdict was entered for the plaintiff in error, with leave to move the Court to set aside that verdict and enter a verdict for the penalty of the bond: and, that Court being moved, it was agreed that a special case should be stated, to be turned if necessary into a special verdict, with a view to carry the question elsewhere, in the event of either party not being satisfied with the judgment of that Court.

The Court of Common Pleas, on the argument of that case, pronounced judgment for the plaintiffs for the sum of 693*l.* Upon the special case being turned into a special verdict, a writ of error was brought into the Exchequer Chamber, and that Court, after very great difference of opinion, however, finally affirmed the judgment of the Court of Common Pleas. The writ of error which brings it before your lordships was then brought by the defendant in the original proceedings (the plaintiff in error) from the judgment of the Exchequer Chamber, affirming the judgment of the Court of Common Pleas: and your lordships, on hearing this case argued, (which it was at great length and with great learning and ability,) had the assistance of nine of the learned judges, including several of those judges who had attended the discussion in the Exchequer Chamber, but, I think, none of those learned judges who had pronounced the judgment originally of the Court of Common Pleas. Those learned judges who attended the argument here differed very materially on some points; in others they concurred. To these points of difference I shall presently call the attention of your lordships. The result is, that it remains for your lordships to pronounce judgment: and I certainly feel, in the circumstances I have stated, very considerable anxiety in recommending the judgment about to be sub-

mitted to your lordships; though I think your lordships will perceive, when I shall have gone through the circumstances of this somewhat singular case, that there will be no doubt whatever what course your lordships ought to take.

There were several points made in the court below, which have not been so far relied upon here as to require the consideration of your lordships: and accordingly on them no questions were put to the learned judges. These related chiefly to the issues on the eighth and eleventh pleas: and the question raised on them was, whether the previous examination of the collector by the commissioners, and the hastening the payment of the moneys collected to the Receiver-General were imperative, so as to constitute those proceedings by the commissioners conditions precedent to their proceeding against the surety, or were only directory. That they were only directory, all the judges below, both in the Common Pleas and Exchequer Chamber, appear to have agreed: nor can there be any further doubt upon the point.

1. We come, therefore, to the questions which now properly remain for consideration. The first that presents itself need not detain us long; but it must be disposed of before the others which are mainly in dispute arise. Was the payment by the collector of the 693*l.* (the amount of the verdict) to the Receiver-General, not to the account of the year 1828-9, for the service of which it had come to his hands, but to the account of a former year during which the defendant was not his surety, a breach of the condition of the bond? It appears to me very clear that such payment was not "well and truly paying according to the true intent and meaning of the acts." The acts intend that the money of each year should be carried to the account of that year. The payment was in discharge of a debt due from the collector for a former year. The appointment of collector is annual: and I can see no difference between this case and that of another person having been collector the former year; in which case it is obvious that no doubt whatever could have been raised. The payment is of another debt of the collector: and, though the public is the creditor in both cases, yet it is the payment of another debt as much as if it had been a debt owing to another creditor. Accordingly we find that all the learned judges are agreed in their opinions upon this point. On this point, too, the judges of the Common Pleas were unanimous.

2. The next question is one upon which the Court of Common Pleas gave no opinion, and on which all the other judges, with one exception, [PARKE, B.,] are agreed, as well those whose assistance we have had here, as those who dealt with the case in the Exchequer Chamber. "Was the seizure and sale of the lands and goods of the collector, of the existence of which the commissioners had notice or knowledge, a condition precedent to their right to put the bond in suit against the surety?" The words of the 43 G. 3, c. 99, s. 13, appear to me to leave no reasonable doubt on this subject. After pointing out the manner of giving security, it proceeds to enact, "that no such bond shall be put in suit against any surety, for any deficiency other than what shall remain unsatisfied after the sale of the lands and goods of such collector, in pursuance of the directions and powers given to the respective commissioners by this act." Now, as this, taken by itself, could really leave no doubt that the bond was only to be sued upon for the balance left unpaid after the collector's lands and goods had been seized and sold,

and, as the only ground upon which a question can be raised, is the reference made to the powers given by the act, (which are specified in the fifty-second section;) it becomes material to consider that section. It *empowers* and *authorizes*, but does not *require*, the imprisonment of the collector's person and seizure of his estate, real and personal, "wheresoever the same can be discovered and found:" and then it empowers and *requires* the sale of the property which may have been seized, if the collector shall not have paid before the next meeting: whence it is contended, that, as the commissioners have a *discretion* given them to *seize*, and are only *required* to *sell* what they have *seized*, they are only forbidden by the proviso in the thirteenth section from suing the surety for more than the balance left unsatisfied by the seizure and sale, in case they shall have *elected* to seize and to sell under the fifty-second section. But, the reason why the seizure is discretionary and the sale only imperative, is, to give the collector the opportunity of redeeming his property after seizure. The fifty-second section relates to the proceedings against the collector; the thirteenth, to those against the surety: and the proviso in the latter appears expressly framed for the benefit of the surety. Whoever gives bond for the collector, must, on reading the thirteenth section, imagine that he only becomes bound for what shall remain unsatisfied after seizure and sale of the collector's property. To hold that the commissioners have a discretion given them by the fifty-second section to proceed or not against the collector, imports into the thirteenth a condition that would entirely alter the nature of the proviso, render it unavailing to the surety, and place him in the same situation in which the collector himself is under the 8 & 9 W. 3, c. 11, and in which the surety would have been, had this proviso not been introduced into the act, although it is plainly the intent of the proviso to place him in a better situation than the collector.

The argument, that the powers given by the fifty-second section may be exercised in the surety's favour after he shall have been compelled to pay the debt, and that a mandamus will or may lie to compel them to seize and sell, does not appear to have any good foundation. The power given by that section is, to seize and sell for the collector's debt. The power given is, to seize, on his default, and sell, for what he has left unpaid. If the payment by the surety is *his* payment, there is no power to seize and sell; for there is no debt. If the payment by the surety is *not* his payment, then there may be a debt, and there may be a power to seize: but there is more; there is an obligation to pay over, just as if the debt still subsisted. So that, if the commissioners are compellable to seize and sell because the surety has paid, they are compellable to pay the proceeds into the Receiver-General's hands, although the surety shall have already paid; and then the surety must look to the Receiver-General, without any words whatever giving him such recourse;—a construction which seems to me to be wholly untenable. It therefore appears to me sufficiently plain, that the bond cannot be put in suit against the surety, unless and until the commissioners have exercised the power given them against the principal. Although, where a statutory enactment is clear, there is no occasion to argue from the consequences of a construction, and where it is ambiguous, such an argument is only admissible if it is connected with the general intention of the act; yet we cannot avoid perceiving here, that, unless the commissioners are *obliged* to seize the collector's goods before they have recourse to the surety, they may and

very likely will proceed against a solvent surety rather than incur the trouble of seizing and selling: so that the whole benefit intended for the surety will be utterly lost to him.

3. The next question has given rise to a much greater diversity of opinion: it is, whether the commissioners are bound, before proceeding against the surety, to seize all the collector's lands and goods, or only those of which they have notice; meaning by *notice*, as is now on all hands agreed, *knowledge*, however acquired.

The proviso in the thirteenth section is clear and express, that the bond shall not be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands and goods of the collector, in pursuance of the directions and powers of the act, that is, those given by the fifty-second section. This sale being by what has been already shown a condition precedent, the thirteenth section must be read as if it provided that the surety shall not be sued until after the lands and goods of the principal shall have been sold under the powers of the fifty-second section, which authorizes the seizure and sale of the whole estate wheresoever it can be discovered and found. The two sections taken together thus make no exception, and make the sale of all the principal's estate a condition precedent to the commencement of proceedings against the surety. Have we any right to engraft upon this plain and positive enactment a qualification, restricting the condition to such estate only as shall have come to the knowledge of the commissioners? The only words that can be supposed to import any restriction whatever are these: "wheresoever the same can be discovered and found."

But these words only refer to the local situation of the property, and are meant to give a power over the whole, wheresoever situated. They are enabling words, words of enlargement rather than restriction. They import that, whatever property can be anywhere found may be seized. If they are read as they must be to support the argument raised upon them, they must be thus read: "Wheresoever the property shall be discovered or become known to them;" or rather, "If any such property shall be discovered or become known to them?" But how could they seize any which had not become known to them? This is plainly an insensible construction; and the words can only refer to the situation. They mean all property wheresoever found.

It is not to be denied that the condition of notice may sometimes be implied, where the words of an enactment do not specify it. But this cannot be in cases where the party has no exclusive means of knowledge, or no duty to inquire. The surety *may* know more about the affairs of the collector than the commissioners; but not necessarily so: nor is there any duty cast upon him more than upon them, to become acquainted with the collector's property. The consequences of a construction which does not hold notice to be necessary, form confessedly the only ground for maintaining the affirmative of the proposition. It is said, and truly said, that, if the commissioners cannot proceed against the surety until all the property of the collector is seized, they may not be safe in proceeding while any unknown parcel of goods exists, or in case any estate, real or personal, has on the eve of the seizure come to the collector by descent, devise, or bequest. But nothing can be more dangerous than to make such considerations the ground of construing an enactment that is quite complete and unambiguous in itself. If we

depart from the plain and obvious meaning on account of such views, we in truth do not construe the act, but alter it: we add words to it, or vary the words in which its provisions are couched: we supply a defect which the legislature could easily have supplied; and are really making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words; and the prolixity of modern statutes is still more remarkable than the shortness of the old. The only safe rule is, to hold, that, if the legislature had intended to obviate the consequences apprehended, it would have done so: nothing, confess edly, being more easy than to have added words for confining the condition precedent to the property of which the commissioners had notice.

In considering this point no authorities are to be found, except so far as the dicta of Lord TENTERDEN and of HOLROYD, J., in *Peppin v Cooper*, 2 B. & Ald. 431, certainly favour the literal construction rather than the other. But then no case has been cited, and none can be shown, where, in construing a recent statute requiring all the things of a certain description to be dealt with by A. in a particular way, the Courts have held themselves called upon to add the words "and whereof A. had notice or knowledge." Nothing could justify this but the impossibility of making sense of the provision otherwise. Now, here, it is not contended that the general meaning of the enactment makes the addition necessary; the statute is very sensible without it. Neither is it necessary for enabling the commissioners to act. They may ascertain the property of the collector at the time of appointing him and accepting his security. They may even inform themselves from time to time of any change in that property. But, if they should be unable to do so, and inconvenience should thence arise, still this is no ground for adding to the statutory enactment; because the legislature might easily have provided against it.

4. But supposing we are agreed that the seizure and sale is a condition precedent, and that the want of notice is immaterial; in other words, that the surety has a good defence to the action, on the ground that the plaintiffs (the commissioners) had not seized and sold the collector's property; although it follows from hence that the judgment must be reversed, because it cannot be given for the plaintiffs, it still does not follow that it must be entered for the defendant, or that, in the state of this record, it can be so entered. We must, therefore, now examine the pleadings with a view to finding whether or not there be any issue joined between the parties upon which judgment can be given. For this purpose the plea set out, and the issue on the replication thereto, and the rejoinder, need alone be considered; because the whole question on the pleadings resolve themselves into the question arising on that plea.

The plea set out is, that the collector, before action brought, and continually hitherto, had lands and goods within the jurisdiction of the commissioners, *of which they had notice*, and which might have been seized and sold under the act to satisfy the debt of the collector; but that the same had not been so sold by them;—in substance, that the collector had property *of which the commissioners had notice*, and that they did not seize and sell it. The replication is, that, after the default, the collector had within the jurisdiction of the commissioners no land—

of which they had notice, and no goods *of which they had notice* other than a certain parcel known to them, and which they had seized and sold;—in substance, that the collector had *no* property subject to seizure and sale, of which the commissioners had notice. The rejoinder is, that, after the default, the collector *had* lands which the commissioners might have seized and sold, and that, after the default, all the *goods* of the collector, at the time of the default, and which might and ought to have been discovered and found by the commissioners within their jurisdiction, were not seized and sold by them in pursuance of their powers under the act, *in manner and form as alleged by the plaintiffs: and it concludes to the country*;—in substance, that the collector *had* lands which might have been sold, and that his goods, which might have been sold, were not sold: and this rejoinder says nothing whatever of notice: the *modo et formâ* clearly referring not to the substantive matter of the plaintiffs' allegation, viz., "goods of which the commissioners had notice," but only to the manner in which the plaintiffs had made the allegation. Then, the verdict is, that the collector *had* lands and goods after the default and until the commencement of the suit, which lands and goods might have been seized and sold by the commissioners under the act before the commencement of the suit; but that the commissioners had *no notice* of the collector's lands, but had reasonable grounds for believing that he had goods: and, as this does not amount to a finding that they knew of the goods, nor indeed even to a finding that they believed he had any, it has been treated as a finding that they had no notice of either lands or goods. I am rather disposed to regard it as negating notice of the lands, and as no finding at all on notice of the goods: but this becomes immaterial, if the notice is immaterial; and therefore let it be taken, as it has been taken, to be a finding that the commissioners had notice neither of lands nor of goods.

We are now to consider what the issue is upon which this verdict is found, and whether there really is any issue at all. The plea affirmed the existence, not of lands and goods absolutely, but of lands and goods of which the commissioners had notice, and which they might have seized and sold. The replication asserts that there were no seizable and saleable lands and goods of which the commissioners had notice. The rejoinder, without mentioning notice at all, asserts that there were seizable and saleable lands, and that goods seizable and saleable were not seized and sold; which, though very inartificially expressed, may be taken, after verdict, to assert (what it does not, except inferentially) that the collector had goods as well as lands seizable and saleable. Now, it is plain that here the parties make their averments of and concerning different things, and not of the same thing: the one pleads respecting property in one predicament; the other respecting property in another predicament. The allegations of the two parties, far from being diametrically opposed to one another, as they must be to raise an issue, are not at all inconsistent with each other. If I say that all the freehold lands of J. S. in the manor of A. have been sold, and my adversary only says that all the lands of J. S. in the manor of A. have not been sold, he does not negative my assertion. My proposition contained a negative pregnant: (indeed the replication would on this ground have been demurrable specially:) I might have explained or particularized the proposition thus—"All the freeholds have been sold, but all the copyholds remain unsold;" and my adversary might have explained or par-

acularized his proposition in the very same words: so that, instead of one having asserted an affirmative and the other a negative respecting the same matter, which is the character of every issue, each of us would have only been asserting propositions, which, far from being opposite, are quite consistent, and might have been identical.

The more this pleading is examined, the more plainly it will appear that it raises no issue at all; neither an informal one, which would be cured by the statute after verdict; nor an immaterial one, which could not be so cured: but no issue whatever. Consequently, the verdict is a nullity, according to the authorities. *Sandback v. Turvey*, Cro. Jac. 585, and other cases, lay this clearly down. And, although cases are cited which seem to throw some doubt upon the position, it is to be observed that these are rather cases where there *was* an issue raised, though an informal issue. One of them, too, *Parker v. Taylor*, Cro. Car. 316, is said in another case, *Walsingham v. Combe*, Siderfin, 289, to have been denied; and another of them, *Walthal v. Aldrick*, Cro. Jac. 588, was decided the very term after *Sandback v. Turvey*, viz. Michaelmas, 17 Jac. 1; and without any reference to the former case, which plainly shows that the two decisions were not regarded as inconsistent. Nothing, indeed, could be more contrary to all principle, nay, to all common sense, than to regard a finding upon an issue which had no existence as other than a nullity. The jury must be taken to have found a verdict upon a matter not before them, as much as if they had given a verdict in another cause.

The learned judges have all agreed that the verdict on the plea set out must be entered for the defendant: but none of them hold that the judgment can be given for the defendant. Upon different reasons, they all arrive at this conclusion, as well those who hold the seizure and sale of all property a condition precedent, as those who hold only a seizure and sale of the property known to the commissioners a condition precedent: and much more the learned judge who alone considers the seizure and sale no condition precedent at all—whether with or without notice. Mr. Baron PARKE alone took that view of the case when before the House. One learned judge in the Court of Exchequer, 2 Scott. 63, concurred with him in that opinion, viz. my Lord ABINGER. All the other judges in the Court of Exchequer Chamber, as well as here, took a different view. The whole of the learned judges, therefore, whose opinions have been given in answer to the questions put, are agreed that there can in no view be judgment for the defendant upon the issues which these pleadings raise; but that, if judgment be not entered for the plaintiffs, there must be a simple reversal, and the parties must begin again, should they be so advised.

5. The only grounds upon which judgment could be given for the plaintiffs are two—either that it may be given *non obstante verdicto* on an implied confession in the rejoinder, or that, upon matter disclosed in the other parts of the record, it may be given, disregarding the immaterial issue. But all the learned judges hold that judgment *non obstante verdicto* cannot be given upon an implied confession in the rejoinder. that, if there were lands and goods, the commissioners had no notice of them: and surely the mere dropping all mention of notice, the merely not reasserting in the rejoinder the notice which was asserted in the plea, cannot be taken as a confession of want of notice entitling the plaintiff to judgment. The case on this point stands

thus,—the plea is good, even if notice be supposed necessary. The replication meets the plea on this ground, and therefore answers it sufficiently: the rejoinder, dropping all mention of notice, is bad on the supposition that notice is necessary, and might have been demurred to. But then it contains no confession. The mere leaving out notice—the not averring notice—does not confess the want of it. The averment in the replication was not substantive that the commissioners had notice; but the notice was part of one entire allegation, and the omitting a part which was essential to its materiality, and so leaving what was least immaterial, cannot be taken as a confession of the thing omitted. Therefore, even supposing notice material and necessary, the plaintiffs could not have judgment on this ground.

Supposing notice necessary, the plaintiffs cannot have judgment on the whole record, if, as all but one (*a*) of the learned judges held, the seizure and sale be a condition precedent. All are agreed; with the exception of another judge, who, agreeing that the seizure and sale forms a condition precedent, yet holds that enough appears on the whole record to entitle the plaintiffs to judgment. (*b*) For this opinion, there is confessedly no direct authority: but what the Court of Common Pleas said in *Goodburne v. Bowman*, 9 Bingh. 52, (23 E. C. L. R. 369,) 2 M. & Scott, 713, is relied on to show, that, though it is admitted you cannot have recourse to one plea not expressly referred to, in considering the sufficiency or insufficiency of any other plea, yet that all the pleas may be taken into consideration on a motion to enter judgment *non obstante veredicto* on the whole record. But it does not appear to have been necessary to the determination of that case that this should be held: It was therefore extrajudicial: and, even if it had not been so, there is this difference between the two cases,—that there, the pleas were held bad out of which the immaterial issues arose, while here, a good plea remains in bar of the action, after passing over the immaterial issue, or treating it as a nullity. The judgment of reversal which may now be given will therefore substantially agree with all the opinions but one of the learned judges, upon the assumption—in which all but another of the learned judges are agreed—that seizure and sale is a condition precedent.

The consequence will be that the plaintiffs may begin *de novo*. But, if I am right in agreeing with those of the learned judges who hold want of notice to be immaterial, the most carefully conducted pleadings in another suit never can avail the plaintiffs, or entitle them ultimately to a judgment.

6. A repleader would have been awarded in the Common Pleas, had the points on the pleadings been made there; but it is agreed on all hands that a Court of Error cannot award a repleader.

Of the question to which I have directed the attention of your lordships, it is to be observed, that, though the first three—those upon the merits of the defence—were decided in the Court of Common Pleas, those arising upon the pleadings do not appear to have been there made; and accordingly we have no judgment upon them, except that in the Exchequer Chamber, where one only of the three learned judges who have not attended your lordships has given any opinion on those points. Even of the questions upon the merits, the first appears to have been

argued more fully than the other two : a great part of the judgment is upon points which have never been made, or at least at all relied on here ; and a very small portion of it relates to that which has been the subject of discussion before your lordships.

Lord COTTENHAM, C. My lords—Notwithstanding the complexity of this case, and the difference of opinion amongst the judges upon some points, it does not appear to me that there is much difficulty in deciding upon the course this House ought to adopt : because there are points upon which there is a uniformity of opinion amongst the judges, in which it is, I think, impossible not to concur. That the condition of the bond was broken, there is, I conceive, no doubt. In this all the judges concur ; and all but one concur in thinking that the appropriation of the property of the collector towards payment of the debt due from him, was a condition precedent to calling upon the surety. Whether it was to exhaust the whole of his property, or such part only as came to the knowledge of the commissioners, was the subject of much difference of opinion amongst the judges. But as the defendant by one of his pleas set up the defence that property of the collector, of which the commissioners had notice, had not been applied, and as the decision must turn upon the course adopted by the parties upon that plea, it does not appear to me to be very material to consider how far the defendant might have defended himself by pleading and proving that the collector had property unapplied of which the commissioners had notice.

According to the opinion of all the judges but one, the plea in question, if established by a verdict, would have amounted to a good defence to the action. Objections were made to the manner in which the plaintiff's replication to this plea was framed ; but, in substance, the replication tendered an issue upon the defence set up in the plea, alleging that the collector had property of which the commissioners had notice. The defendant, however, instead of joining issue upon the point so raised, by his rejoinder departed from it altogether. The plaintiffs, instead of taking the proper course to correct this irregular pleading, took issue upon it ; and the question is, what, under such circumstances, ought to be the fate of the action. The issue so raised being, if to be considered as an issue at all, immaterial, cannot, though found for the defendant, be the ground of a judgment for him in the action ; and the state of the pleadings precludes the plaintiffs having a judgment *non obstante veredicto* ; for, so far from there being any admission upon the record of his title, there is the plea in question, which, if true, would constitute a good defence to it. This unfortunate state of the pleadings could not have arisen without blunders on both sides. That there can be no replender in this House appears clear from the opinion of all the judges, and the authorities to which they refer ; and, as there can neither be judgment for the plaintiffs nor for the defendant, the only course is, to reverse *simpliciter* the judgment of the Court below.

Lord BROUGHAM. The defendant cannot get his costs, though he succeeds ; but, upon the whole, every thing connected with the rejoinder being considered, I cannot say that that, in my opinion, is to be regretted.

Judgment reversed.

END OF THESE REPORTS.

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TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

William

ACTION ON THE CASE.

See PLEADING, 8.

The mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall.

Nor, if he be ignorant of the existence of the adjoining wall,—as where it is underground,—is he bound to use extraordinary caution in pulling down his own. *Chadwick v. Trower and Others*, 1

AGENT.

See BILL OF EXCHANGE.

AGREEMENT, CONSTRUCTION OF.

See BILL OF EXCHANGE.

In an action on an agreement to let plaintiff a message for a year from the 25th of March, plaintiff to take the fixtures at a valuation and to pay for the same on entry, Held, that it was open to plaintiff to show a tender on the 10th of April. *Edman v. Allen*, 19

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See PLEADING, 9, 10, 11, 12.

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ARBITRATION.

See AWARD.

By an order of Nisi Prius, to which F. consented to become a party, a decree was to be obtained in Chancery, by consent, to refer a cause, and a Chancery suit between the same parties, to a Master in Chancery: plaintiffs, trustees for F., having, in violation of their consent, frustrated the endeavour to obtain such a decree from the Court of Chancery, and having applied for a new trial in the cause, the Court granted the application for a new trial,

but only on condition of plaintiffs' paying the costs of the day and of the motion for a new trial, and of a motion for an attachment for not obeying the order of Nisi Prius. *Morgan and Another v. Miller and Another*, 168

ASSESSED TAXES.

G., as surety for A. B., who was appointed a collector for the year 1828, executed a bond, with a condition that A. B. should "well and truly pay or cause to be paid unto the Receiver-General of the taxes, &c., all such sum and sums of money as should come to the hands of the said A. B. as such collector, upon the days and at the times by the acts (43 G. 3, c. 99, and 3 G. 4, c. 88) appointed for the payment thereof, and according to the true intent and meaning of the said acts."

In an action against G. upon this bond, he pleaded that, before the commencement of the action, A. B. was possessed of and entitled to divers lands, goods, and chattels, of great value, to wit, &c., as of his own property, and within the jurisdiction of the commissioners, of which the plaintiffs had notice, and which said lands, goods, and chattels were subject and liable to be seized and sold, and might have been seized and sold, in pursuance and by virtue of the directions and powers given to the commissioners by the statute, for the purpose of satisfying and paying such sum and sums of money assessed and collected by A. B., and detained or not duly paid by him in pursuance of the direction of the statutes, but which lands, goods, and chattels remained unsold by the commissioners. The replication to this plea stated that A. B. had no lands within the jurisdiction of the said commissioners which they could seize and sell, of which they the plaintiffs had notice; and that all the goods and chattels of A. B. within the jurisdiction of the commissioners, and of which the plaintiffs had notice, were seized and sold in pursuance of the directions and powers given to the commissioners in that behalf. The defendant rejoined, that A. B. had lands within the jurisdiction of the com-

missioners which they could have seized and sold, and that all the goods and chattels of A. B., which could have been discovered and found by the commissioners within their jurisdiction, were not seized and sold.

By a special verdict it was found that A. B. had paid over to the Receiver-General all the sums received by him for assessments for the year 1828, but that he did not pay all those sums to the service of that year, 693*l*. part thereof, having been paid to the account or service of former years, during which he had also been collector, but during which the defendant had not been his surety. It was further found that A. B. had, after his default, lands or houses of the value of 121*l*., and also goods of the value of 200*l*., which could have been seized and sold by the commissioners; that the commissioners had not notice that A. B. was possessed of any houses, lands, or goods, at the time of his default; but that they had reasonable grounds for believing that he possessed household goods at that time of the value of 200*l*., which might have been seized and sold. *Held*, &c.

First, that payment by A. B. of moneys collected by him to the account of former years was a breach of the condition of the bond.

Secondly, that seizure and sale of lands and goods of A. B., of the existence of which the commissioners had notice or knowledge, was, under 43 G. 3, c. 99, s. 9, a condition precedent to their right to put the bond in suit against the surety. *Parke, B., diss.*

Thirdly, that seizure and sale of lands and goods of A. B., of the existence of which the commissioners had no notice or knowledge, was not a condition precedent to their right to put the bond in suit against the surety. *Per Littledale, J., Vaughan, J., Parke, B., Bosanquet, J., Williams, J., and Coltman, J. Contra Lord Brougham, Paterson, J., Gurney, B., and Coleridge, J.*

Fourthly, that the defendant was entitled to a verdict on the issue (supposing any issue could be said to be raised thereby) arising on the rejoinder to the replication of the above plea: but not to judgment thereon.

Fifthly, that the plaintiffs were not entitled to judgment *non obstante veredicto* on the issue arising out of the fifth plea, on any supposed implied admission in the rejoinder that the plaintiffs had no notice of the existence of the lands and goods in question.

Sixthly, that a court of error cannot award a repleader. *Vaughan, J., and Williams, J., diss. Gwynne v. Burnell and Mercer, 453*

ATTORNEY.

See MISFEASANCE.

Defendant, who had borrowed money of plaintiff, was, by an agreement, to which plaintiff's attorney was the attesting witness, to pay the expenses of that agreement and of the various securities, including a warrant of attorney:

Held, that plaintiff's attorney, who had prepared those securities, was compellable to deliver his bill to defendant to be taxed. *Painter v. Lindell*, 197

AWARD.

1. Upon a reference of a cause and of all

matters in difference between plaintiff and defendant, the main question was, which of them should pay the expenses of a ship, in which they had been jointly interested, incurred after March 24th, 1838. The arbitrators directed plaintiff to pay them, and to give defendant a bond of indemnity against the payment of such expenses. Held, that the award was good. *Brown v. Watson*, 113

2. A. and B., partners, referred to arbitration all matters in difference between them and C.; and if either of the parties should die before the award was made, it was to be delivered to his personal representatives, or such of them as should desire the same: pending the arbitration B. died: several meetings were held after his death, and C. then protested against the arbitrator's proceedings, unless the executor of B. were made a party. An award having been made in favour of A. without B.'s executor having been made a party, the Court refused on that ground to set the award aside. *In the Matter of Harv. Miles and Hansell*, 158

3. Defendant having agreed to buy of plaintiff certain property, for which he was to pay an annuity and a large sum by instalments, a verdict for 10,000*l*. was taken in an action for default of payment, subject to a reference of the cause and all matters in difference; 3500*l*. to be paid by defendant to the arbitrator, to be by him paid to plaintiff if found due in the action, and the arbitrator to order what should be done by the parties. The arbitrator directed that defendant should pay, in addition to the 3500*l*., a gross sum including the value of the annuity, without distinguishing how much in respect of the matters in difference, and how much in respect of the cause, but ordered a verdict on all the issues to be entered for plaintiff: Held, a valid award as against defendant: also that an act of bankruptcy committed by defendant before the award, on which a fiat was issued the day after publication of the award, was no ground for setting it aside. *Taylor v. Shuttleworth*, 277

4. An arbitrator, to whom a cause had been referred, found all the issues, one of which was an issue on a set-off, in favour of the plaintiff, and assessed general damages on such finding; he ordered a certain sum and costs to be paid on a Sunday, and before defendant could have an opportunity of moving to set aside the award:

Held, that these were no grounds for setting aside the award. *Hobdell v. Miller*, 292

BANKRUPT.

See EVIDENCE, 2. TROVER.

1. Under 6 G. 4, c. 16, where a petitioning creditor's debt turns out to be insufficient to support a fiat, and the Chancellor orders the commission to be proceeded in on proof of a sufficient debt by any other creditor, the debt of the second may be added to that of the first, to make up the requisite amount. *Myers and Another, Assignees of John Clark, a Bankrupt, v. Southwell*, 39

2. Goods were sold by defendant as agent of C., in contemplation of C.'s bankruptcy, for the purpose of raising money for defendant and C.: the buyer did not know the sale to be fraudulent: Held, that such sale was not

- an act of bankruptcy by C. *Harwood, Assignee of Creed, a Bankrupt, v. Bartlett*, 61
3. To an action by assignees of a bankrupt for the price of a phaeton for which defendant had agreed to pay ready money, defendant pleaded a set-off in respect of a bill of exchange drawn by H., accepted by the bankrupt, and endorsed by H. to defendant. Plaintiffs replied that, after the bill was dishonoured, H. endorsed it to defendant without consideration, in trust that defendant should purchase the phaeton of the bankrupt, hand it over to H., and fraudulently attempt to set off the bill against the price of the phaeton: Held, a sufficient answer to the claim of set-off. *Luckington and Others, Assignees of Richardson, a Bankrupt, v. Combes*, 71
4. D. being captain of a ship bound to the East Indies, and proprietor of the cabin furniture, deserted the ship at Algoa Bay, when the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship. On the 18th of October, while the ship was on her voyage home, D., being indebted to the owner, gave him a written order as follows:—"I hereby authorize you to keep possession of my cabin furniture when the ship arrives, and to place the value of the same to the credit of my account with you." The ship arrived on the 5th of December, and a fiat in bankruptcy was issued against D. on the 18th, on an act of bankruptcy committed on the 2d. Held, that D.'s assignees could not recover against the owner in trover for the cabin furniture. *Belcher and Others, Assignees of Thomas Driver, a Bankrupt, v. Oldfield*, 102
5. Defendant, subject to the approval of a meeting of creditors, agreed to pay plaintiffs, assignees of B., a bankrupt, 2012*l.*, supposed to be equal to 10*s.* in the pound, upon all debts then proved: the fiat was to be worked in the usual way: a claim of defendant's of 700*l.* was to be allowed in full; the assignees to pay the costs of the bankruptcy; the surplus of the estate to be divided among the creditors; but the dividends of those who had previously received 10*s.* in the pound to be paid over to defendant, and the excess beyond 10*s.* in the pound to belong to the creditors: Held, that this agreement was void, as contrary to the policy of the bankrupt law. *Staines and Others, Assignees of Birch, a Bankrupt, v. Wainwright*, 17
6. The statute 2 & 3 Vict. c. 29, touching execution against bankrupts, is retrospective. *Luckin v. Simpson*, 353
7. A bankrupt, having, within two months before the fiat, deposited chattels by way of pledge, in consideration of an advance of money: Held, that the transaction, though *bona fide*, and without notice of an act of bankruptcy, was not protected by sect. 32 of 6 G. 4, c. 16, and that the assignees might recover in trover. *Fearnley v. Wright and Others, Assignees of Ross, a Bankrupt*, 446

BANK OF ENGLAND.

A London joint stock bank agreed with a bank in Canada that G. P., manager of the London joint stock bank, but not a partner therein, should accept bills drawn by the Canadian bank, payable at a date earlier than six months, and that the London joint stock bank

would provide funds for the due payment of such bills: Held,

1. That the acceptance of such bills in execution of such agreement, was unlawful, regard being had to the acts in force respecting the Bank of England:

2. And would not have been lawful, even if the London joint stock bank, at the time of such acceptances, had, in their hands, funds of the Canadian bank equal to the amount of the bills:

3. Nor if, without such funds in the hands of the London joint stock bank, the bills had been accepted by G. P. on the credit of a contract by the Canadian bank to remit such funds to meet the acceptances: and

4. That the Bank of England might maintain an action against the London joint stock bank, founded on such transactions. *Booth, Bart., and Others, v. The Bank of England*, 415

BILL OF EXCHANGE.

See EVIDENCE, 3, 4, 5.

Defendants, merchants in London, received orders from G. at St. Petersburg for a quantity of Havannah sugars: that order was revoked, and another given for Brazil sugars, for the amount of which defendants were to draw on plaintiff, G.'s agent at Hamburg, by a bill at three months: plaintiff accepted the bill; wrote to G. for instructions because defendants had been accredited for Havannah sugars and not Brazil; and then to defendants to say that he had accepted the bill under their guaranty for the present, as he had not received the accreditive: G. then wrote to plaintiff, giving him credit for the Brazil sugar, and requesting him to release defendants from their guaranty: G. failed before the acceptance became due: Held, that plaintiff was liable to defendants on this acceptance, notwithstanding defendants, after G.'s failure, wrote to plaintiff,—"We have received from G. the assurance that he has arranged with you the needful for the protection of the draft: we reserve to ourselves any advantage from the insurance of the goods: if you have written to G. that you have not honoured the draft, we cannot consider your acceptance as valid in any other way than on account of G. *Lohman v. Rougemont and Another*, 253

BOND.

See ASSESSED TAXES.

BY-LAW.

The company of Poulters comprises all poulters in London, and within seven miles thereof, and no one can be of the livery of a company unless he be a freeman of the city of London: Held, that a by-law authorizing the company to admit into the livery of the company any freeman of the company, was a valid by-law, and must be intended to imply any freeman of the company who was also free of the city. *The Poulters' Company v. Phillips*, 314

CHARTER-PARTY.

See PLEADING, 7.

Under a charter-party, defendant's ship was to

proceed from London to Bombay, and there discharge her cargo: and there load a cargo, with which she was to proceed direct to London: the merchant to have the privilege of sending the ship to Calcutta from Bombay, upon paying for the extra time occupied: if the ship returned from Bombay direct to London, the merchant was to have the power of sending her to one port on the Malabar coast, to receive cargo, paying for the extra time: Held, that defendants after discharging at Bombay were not bound to take on board a cargo there for Calcutta. *Cockburn and Another v. Wright and Others, Executors and Executrix of Henry Wright, deceased*, 223

COLLECTOR.

See ASSESSED TAXES.

CONDITION PRECEDENT.

See ASSESSED TAXES.

CONSEQUENTIAL DAMAGE.

See ACTION ON THE CASE.

COSTS.

See PRACTICE, 6, 7, 9.

1. The affidavit in support of a motion to enter a suggestion for costs under the Middlesex court of requests act need not state that the cause of action arose within the jurisdiction of the Court.

2. The motion may be made, as well in a cause tried before the under-sheriff, as in one tried before a judge.

3. The motion lies as well against an executor plaintiff as any other. *Bishop, Executrix of Rugby, v. Marsh*, 12

2. Slander; verdict for defendant on the general issue; for plaintiff, without damages, on a plea of justification:

Held, that notwithstanding 21 Jac. 1, c. 16, s. 6, plaintiff was entitled to his costs occasioned by the plea of justification. *Skinner v. Shoppee and Wife*, 131

3. A bishop, defendant in *quare impedit*, who fails upon demurrer, may be exempted from costs by certificate of the Court, under 4 & 5 W. 4, c. 89. *Edwards v. The Bishop of Exeter, and Todd, Clerk*, 146

4. Plaintiffs' attorney, in possession of a probate essential to defendant's case, having given an oral, but having refused to give a written undertaking to produce it at the trial, defendant's attorney warned him that an exemplification of the will must be procured at a heavy expense: the probate was produced at the trial on the part of plaintiffs:

Held, that defendant, who obtained the verdict, was entitled only to the expense of an ordinary copy of the will, and of a summons to call on plaintiffs to admit it. *Goldstone and Another, Executors of Ann Tovey, v. Thomas Tovey*, 274

COVENANT.

1. Held, a good plea in covenant on a lease, that the lease was entered into by plaintiff and defendant, and that the premises were let to defendant for the express purpose of being used by defendant in drawing oil of

tar and boiling oil of tar, contrary to the provisions of the statute 25 G. 3, c. 77. *The Gas Light and Coke Company v. Turner*, 324

2. Plaintiff demised salt springs to defendant, who was to erect salt works on the premises, and pay a rent in proportion to the number of works erected: Defendant covenanted to leave the works in good repair at the end of the term: Held, that iron salt pans placed by defendant on a frame of brick, and used in the boiling of salt, were parcel of such works, and that defendant was not entitled to remove them. *Earl of Mansfield v. Blackburn, Executor of John Blackburn*, 426

DEVISE.

1. Testator, having three different estates, left one to G. A. for life, remainder to G. A.'s first son for life, and then to the issue of such first son in strict settlement; remainder in like manner to G. A.'s second and other sons, and their issue: the use of the second estate to G. A. for life, and to his child or children other than and except an eldest or only son, in fee; the third to E. L. for life, and her children in strict settlement.

At the time of testator's death, plaintiff was the second son of G. A.: at the death of G. A. he was the only child, the first son having died in the interval: Held, that plaintiff was entitled, on the death of G. A., to take the second estate in fee. *Adams v. Bush and Others*, 164

2. Testator, possessed of real and personal property, desired his executors, out of such moneys of his as might come to their hands, to purchase two annuities for W. and her children: with regard to the rest of his property, of what kind soever, he desired his executors, after payment of his debts, to pay and make over the whole to his daughter M., the wife of B., and to the children of his daughter after her decease: Held, that the executors took a power to settle the freehold property upon the daughter for life, with remainder after her decease to her children and their heirs. *Knocker v. Bunbury and Wife, and Others*, 306

3. Testatrix had a mansion and lands thereunto belonging, situate in Kesgrave, Bealings, and Playford; also a meadow in Bealings: Held, that the land in Bealings and Playford did not pass under a devise of all testatrix's message and lands "situate at Kesgrave aforesaid," nor under a bequest of "all the residue of her estate and effects wheresoever and whatsoever." *Pogson and Another v. Thompson and Others*, 337

EJECTMENT.

Tenant in possession having absconded, leaving the key of his house in the hands of a broker, with instructions to let the house, Held, that service of a declaration in ejectment on the broker, and fixing a copy on the door of the house, was a sufficient service. *Doe dem. Scott v. Roe*, 207

See HIRE.

ESTOPPEL.

8. being possessed of chambers in Lincoln's Inn, to which he had been admitted by the

benchers, who were the owners of the fee simple, by a deed, reciting that he was seised of them for life, conveyed them to plaintiff, to hold during the life of S. S. continued in possession, and afterwards surrendered the chambers to defendant, who was admitted by the benchers: Held, that defendant was not estopped to deny that S. was seised for life.
Doe dem. Marchant v. Errington, 79

EVIDENCE.

See HIGHWAY.

1. Where a tenant was to hold land according to certain rules in writing under which a former tenant held, but the length of his term was agreed on orally, Held, that to show the expiration of the term it was not necessary to produce the rules:
2. That the lessor, having entered at the expiration of the term, might sue in trespass persons claiming under the late tenant as well as the late tenant himself:
3. Issue having been taken as to the existence of an agreement between the lessor and the late tenant in satisfaction of all demands, Held, that proof of the consideration of the agreement could not be required. *Hey v. Moorhouse and Others,* 52
2. The fact that, after a *flat* had been sued out, certain creditors of the bankrupt delivered up to the assignees goods which they had received from the bankrupt before the *flat*, and before the delivery of certain goods by the bankrupt to defendant, Held, not admissible evidence against defendant in an action of trover brought against him by the assignees. *Backhouse and Another, Assignees of Brown and Graham, Bankrupts, v. Jones and Another,* 65
3. In an action against the drawer of a bill of exchange, plaintiff, by way of excuse for not giving notice of dishonour, averred that defendant had no funds in the hands of the acceptor, nor had he sustained any damage for want of notice: Defendant pleaded he had sustained damage, because the acceptor had promised him to provide for the bill: Held, that it was not incumbent on plaintiff to prove that defendant had sustained no damage. *Fitzgerald v. Williams,* 68
4. In an action against defendant as acceptor of a bill of exchange, no evidence being given in whose hand the acceptance was written, Held, that the circumstance of the bill having been paid by the drawer, and the amount of it obtained on discount by defendant's wife having been applied by her in discharge of his debts, was not sufficient to prove that he had sanctioned the acceptance. *Goldstone and Jay, Executors of Ann Tovey, v. Thomas Tovey,* 98
5. In the absence of evidence to the contrary, a bill of exchange must be taken to have been issued at the time it bears date.
And where an endorsement bore no date, Held, that it was properly left to the jury to determine from the circumstances attending the transfer of the bill, the time at which the endorsement was made. *Anderson v. Weston and Badoock,* 296
6. In an action for wages brought by the secretary of an intended joint stock company against one of the provisional committee, another member of the committee was held a

competent witness for the defendant after a release from him. *Beckett v. Wood,* 380

EXECUTION.

See PRACTICE, 2.

On the 3d of August the sheriff levied under a *fi. fa.*: on the 4th of September he was ruled to return the writ in eight days; before the 13th, defendant died: the writ was not returned till November 1st: it not appearing that plaintiff had lost anything by the delay of the return, the Court set aside an attachment against the sheriff on payment of costs. *The Queen v. The Sheriff of Essex, in a Cause of Dorrien and Others v. Sheridan,* 150

HEIR.

A person born in Scotland, of parents domiciled there, but not married till after his birth, though legitimate by the law of Scotland, cannot take real estate in England, as heir. *Doe dem. Birtwhistle v. Vardill,* 385

HIGHWAY.

1. A demand of highway rate by one only of two surveyors is a valid demand.
2. An inhabitant of the parish for which such rate is made, is a competent witness in support of the rate. *Morrell v. Martin,* 373

ILLEGAL CONTRACT.

See COVENANT.

INSOLVENT DEBTOR.

Defendant, having been outlawed in a cause after judgment, and having been discharged from the debt by the Insolvent Debtors' Court, while in custody under the outlawry, this Court refused to charge him in custody on the judgment in outlawry. *Adcock v. Fiske,* 17

INSURANCE.

See POWER.

A French law provides that "the vessel which shall have fished, either in the Pacific by doubling Cape Horn, or by passing through the Straits of Magellan, or to the south of Cape Horn, at 62 degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishery one half at least of its burthen, or if it can prove a navigation of sixteen months at least."

Held, that a vessel which had caught fish to the amount of half its burthen in the Atlantic, then doubled Cape Horn and fished without success, and was lost within sixteen months after setting sail, had not complied with the conditions of the law, so as to be entitled to the bounty:

Held also, that the practice of the French government to allow the bounty under such circumstances was a mere matter of favour, and did not constitute a vested interest which could be the subject of insurance. *Devaux and Another v. Steele,* 359

INTERPLEADER.

See PRACTICE, 6, 9.

ISSUE.

See ASSESSED TAXES.

JOINDER.

See PLEADING, 1, 2, 4.

JOINT STOCK COMPANY.

See SCIRE FACIAS.

JUDGMENT.

See PRACTICE, 1, 8. ASSESSED TAXES.

LANDLORD AND TENANT.

See EVIDENCE, 1.

LEASE.

See ESTOPPEL.

LIBEL.

1. An alien friend, though resident abroad, is entitled to sue in the Courts at Westminster, for a libel published concerning him in England. *Pisani v. Lawson*, 90
2. A statement in a newspaper, that a ship of which plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not a seaworthy ship, and that Jews had bought her to take out convicts, Held to be a libel on plaintiff in his trade and business, for which he might recover damages, without proof of malice or allegation of special damage. *Ingram v. Lawson*, 212

MEMORANDA, Pages 11, 196, 336.

MISFEASANCE.

Plaintiff being employed as an attorney, to conduct an appeal against the removal of a pauper, omitted to enter and respite the appeal at the first sessions after the removal, and proceeded to the second sessions, after having served the respondents with a notice of the grounds of appeal, signed by himself, instead of the overseers of the appellant parish. The sessions having refused to hear the appeal, Held, that plaintiff was not entitled to recover for his services. *Huntley v. Bulwer and Others*, 111

NEW TRIAL.

See ARBITRATION. PRACTICE, 5.

OUTLAWRY.

See INSOLVENT DEBTOR.

PARTNERS.

Defendant from 1829 till 1833 advanced various sums with a view to a partnership in a market about to be erected; knew that the money was applied towards the erection; and was consulted in every stage: in October, 1833, by a written agreement, it was settled that the market should be valued, and that de-

fendant should have a seventh share: Held, that he was not liable as a partner till October, 1833, notwithstanding profits had been made, but not accounted for to him, before that time. *Howell v. Browdie*, 44

PAYMENT.

See PLEADING, 3.

PLEADING.

See ASSESSED TAXES. VENDOR AND PURCHASER.

1. Plaintiff declared against A., B., and C. for 35*l.*, due in respect of work done for them. Defendants pleaded that the work was done for them jointly with D. It appeared that one portion of the work was done for A.; another portion, to the amount of 4*l.*, for A., B., C., and D.; a third portion for A., B., and D.; and a fourth for A. and B.: Held, that the plea was an answer to the action. *Hill v. White, Williams, and Boulter*, 23
2. To a count for work done, defendants pleaded that the work was done for them jointly with others. Plaintiff proved that work to the amount of 5*l.* was done for defendants, and to the amount of 36*l.* 5*s.* for defendants jointly with others: Held, that the plea was no answer to the action. *Hill v. White and Williams*, 26
3. Payment may be pleaded generally to all the counts of a declaration; and, if it be alleged to have been made after the cause of action accrued, it is immaterial that the day actually specified is a day before the cause of action accrued. *Beesley v. Dolley*, 37
4. Plaintiff and his two partners employed defendants as accountants, for hire, to make out the accounts of the firm, and of the separate balance of each partner: Defendants made out plaintiff's separate balance so erroneously and negligently that, relying on their statement, he was a considerable loser thereby: Held, that plaintiff might sue alone in case for this misfeasance, and that it was no variance to allege that he had employed defendants. *Storey v. Richardson and Another*, 123
5. By the terms of a railway act, the directors were entitled to recover for calls in arrear, upon proving that the defendant was a proprietor, and that notice of the calls was given according to the act, unless the defendant should prove that he had paid the full amount of his subscription. Defendant having pleaded to an action for calls, that he was not indebted, and was not a proprietor, the Court refused to allow him to add pleas that the notice of the calls was not given; that no time or place was appointed for payment; that the calls were made for purposes other than those warranted by the act; that they were made after deviations in the line; and that fewer shares were allotted than the act required. *London and Brighton Railway Company v. Wilson*; *Same v. Fairclough*, 135
6. The Court set aside, without an affidavit of its falsehood, a rambling sham plea, which offered several answers to the action without leave to plead several matters. *Balmoro v. Thompson*, 133
7. Declaration on charter-party, that defendant

had agreed to put a cargo on board at Marseilles, and pay freight by a bill on London at three months. Breach, that defendant did not put any cargo on board, by which plaintiff was put to expenses in procuring one, and that defendant did not pay plaintiff those expenses, or give the bill in the charter-party mentioned, contrary to his promise :

Held, an unobjectionable breach, on motion in arrest of judgment. *Hoggett v. Esley*, 207

8. Plaintiff declared that he retained defendant to print a work, and delivered paper to him for that purpose ; that defendant accepted the retainer, and it became his duty to use due diligence in the printing ; but that he neglected the business of his retainer, and proceeded with the printing in a dilatory manner, and further disregarded his duty and retainer in this, that, instead of using the said paper in the printing of plaintiff's work, he wrongfully pledged it to raise money for purposes of his own :

Held, that the declaration was properly conceived in case. *Smith v. White*, 218

9. In May, 1837, plaintiff and defendant exchanged cases for the opinion of the Court, in an action in trover for certain tobacco. The questions were, whether plaintiff had tendered a proper amount of duty to the customs, and whether this action lay against defendant, a collector of customs. The same question being raised in another action then pending in the Court of King's Bench, plaintiff suspended proceedings till the decision of that cause in Trinity term, 1839 : that Court having determined that the action should be conceived in case for non-feasance, and not in trover, plaintiff in Michaelmas term, 1839, applied to amend, by substituting a count on a non-feasance for his count in trover. The Court allowed the amendment. *Legg v. Boyd*, 240

10. In 1835, plaintiff sued defendants, as executors, for work done on a house of their testator, and delivered his particulars in July 1837, after he had commenced a second action against them in their own capacity for work done to the same house after testator's death ; both actions were referred to arbitration, and an award made was set aside in Hilary term, 1839 : Plaintiff having abandoned his second action, was allowed, in Trinity vacation, 1839, to amend his particulars in the first by adding to them certain items which had been contained in the particulars of the second. *Jones v. Corry and Others, Executors of Wilkins*, 247

11. By a railroad act it was enacted that in an action for calls it should be sufficient for the company to prove that the defendant was a proprietor of shares at the time of the calls for which the action is brought :—the Court refused to allow the defendant in such an action to plead, in addition to *never indebted*, and *not a proprietor*, that defendant had forfeited his shares before the calls in question were made ; or, that he had forfeited his shares and ceased to be proprietor after the calls, and before action. *London and Brighton Railway Company v. Fairclough*, 270

12. The Commissioners of Sewers having obstructed a watercourse which plaintiff claimed a right to navigate, made him an offer of compensation, which he refused and sued for more : defendants, by their pleas, denied the right, and also the obstruction : after abortive

attempts during four years to proceed with a reference of the action, the Court refused the commissioners leave to plead a third plea, which would defeat the action, unless the commissioners renewed, and the plaintiff refused, the offer of compensation made at first. *Medley and Others v. Pritchard and Another*, 442

POWER.

B. and S. having been directed by defendant to effect an insurance on his life in his own name or in the names of B. and S., to whom he was indebted, effected an insurance in the names of B., S., and a third person, whom they had taken into partnership.

Held, that they had no authority for effecting the insurance in the three names ; and, defendant having never acknowledged the transaction, that they could not recover from him the amount of premiums paid on the policy. *Barron v. Fitzgerald*, 201

PRACTICE.

See EJECTMENT. PLEADING, 5, 12. SERJANTS AT LAW.

1. Plaintiff undertook not to sign judgment until after a further demand of plea : defendant, without waiting for such demand, pleaded several pleas without leave of the Court : Held, that plaintiff was justified in signing judgment for the irregularity. *Gould v. Whitehead*, 144
2. In the Common Pleas, it is not necessary that defendant's addition should be endorsed on a writ of *ca. sa.* *Brown v. Hudson*, 152
3. For the purpose of taking out of court money paid in lieu of bail, a tender of defendant is equivalent to appearance. *Brook v. Gunning*, 157
4. The Court refused to change the *venue*, in an action of assault, from Lincolnshire to London, on the ground that the circumstances of the assault had been much discussed in the local newspapers ; that plaintiff and defendant were of opposite political parties ; that plaintiff, after having lectured against the corn laws, had been placarded as the farmer's enemy ; and that defendant was much connected with the magistracy and tory aristocracy of the county. *Charles Seely v. Ellison*, 229
5. A cause in which counsel had been instructed for defendant, having been called on out of its turn upon an allegation of plaintiff's counsel that it was undefended, a verdict was taken for plaintiff before defendant's counsel arrived.

The Court granted a new trial ; the costs of the application to abide the event of the cause. *Dorrien v. Howell*, 245

6. Plaintiff was allowed to amend an order for interpleading obtained from a judge at chambers, on payment of the costs of the application to amend, to all the parties interested, served with the rule *nisi* for the amendment ; but the order for interpleading having been obtained by the sheriff in his own case, and the rule for amendment being no more than a prolongation of the hearing before the judge at chambers, the Court refused the sheriff his costs of appearing on that rule. *Tillard and Another v. Cave, Ford v. Cave. Ellice v. Cave*, 251

7. The Court refused to order a plaintiff to give security for costs on the ground that he had been three times an insolvent and once a bankrupt, and was only suing as trustee for a third person. *Gray v. Brown*, 271
8. Issue joined on matters of fact, with a demurrer to one plea in Michaelmas term, 1836: in January, 1840, that plea and demurrer were struck out, plaintiff never having demanded a joinder in demurrer. The Court refused to enter judgment as in case of non-suit. *Gordon v. Smith*, 273
9. Defendant being sued for rent arrear, and having received notice from a mortgagee not to pay the rent to plaintiff, obtained a rule for the mortgagee to interplead: the mortgagee having declined to appear to the rule, the Court ordered that each party should pay his costs of the suit. *Murdock v. Taylor*, 293

QUARE IMPEDIT.

See COSTS, 3.

SCIRE FACIAS.

In an action against the public officer of a joint stock company, execution, under 7 G. 4, c. 46, against a partner not named in the record, can be obtained only upon a *scire facias*. *Whittenbury v. Law*, 345

SERJEANT AT LAW.

Privilege of the Serjeants at Law. 187, 232, 235

SET-OFF.

See BANKRUPT, 3.

A. and B., as partners, sued defendants for work and labour done in the matter of an executorship: Held, that defendants could not set off money received by A. before the partnership on account of testator's estate, notwithstanding B. had at that time assisted A. in the matter of the executorship, and A., after the partnership, had admitted the receipt of the money. *France and Hill v. White and Williams*, 33

SHAM PLEA.

See PLEADING, 6.

SHERIFF.

See EXECUTION.

SHIPOWNER.

See CHARTER-PARTY.

STATUTE, CONSTRUCTION OF.

See ASSESSED TAXES. BANKRUPT, 6.

A representation made by defendant as to the credit of a firm in which he was partner, Held to be a representation as to the credit

"of another person," within the meaning of 9 G. 4, c. 14, s. 6. *Devauz and Another v. Steinkeller*, 84

SURETY.

See ASSESSED TAXES.

TROVER.

Trover does not lie for the assignees of a bankrupt against a creditor who sues out execution under a warrant of attorney not filed within twenty-one days, if the execution be completed before the act of bankruptcy: the remedy is by an action for money had and received, or by a special action on the statute, 3 G. 4, c. 39. *Brook and Others, Assignees, &c., of Jerom, a Bankrupt, v. Mitchell and Others*, 349

USURY.

The members of a benefit society raised a joint stock fund, portions of which were from time to time advanced to members of the society, by way of loan, at 5 per cent. interest: the sums so advanced were put up to competition among the members, and the member who bid highest obtained the loan: defendant, a member of the society, having bid 15*l.* 17*s.* 6*d.* for a loan of 80*l.*, the 15*l.* 17*s.* 6*d.* to be paid in addition to 5 per cent. interest on the 80*l.*, Held, that the transaction was not usurious. *Silver and Others v. Barnes*, 189

VARIANCE.

See PLEADING, 4.

VENDOR AND PURCHASER.

By the conditions of a sale which took place September 18th, payable on premises, the purchaser was immediately to pay a deposit in part of the purchase-money, and to sign an agreement for payment of the remainder by the 28th of November; the vendor was to deliver an abstract within fourteen days from the sale; and to deduce a good title; objections to the title were to be taken within twenty-one days after the delivery of the abstract; and the purchaser was to prepare the deeds of conveyance by the 10th of November:

Held, that no precise time was fixed within which the vendor was to deduce a good title, and that therefore a declaration against him for failing to do so ought to aver that he had been allowed a reasonable time. *Sansom v. Rhodes*, 261

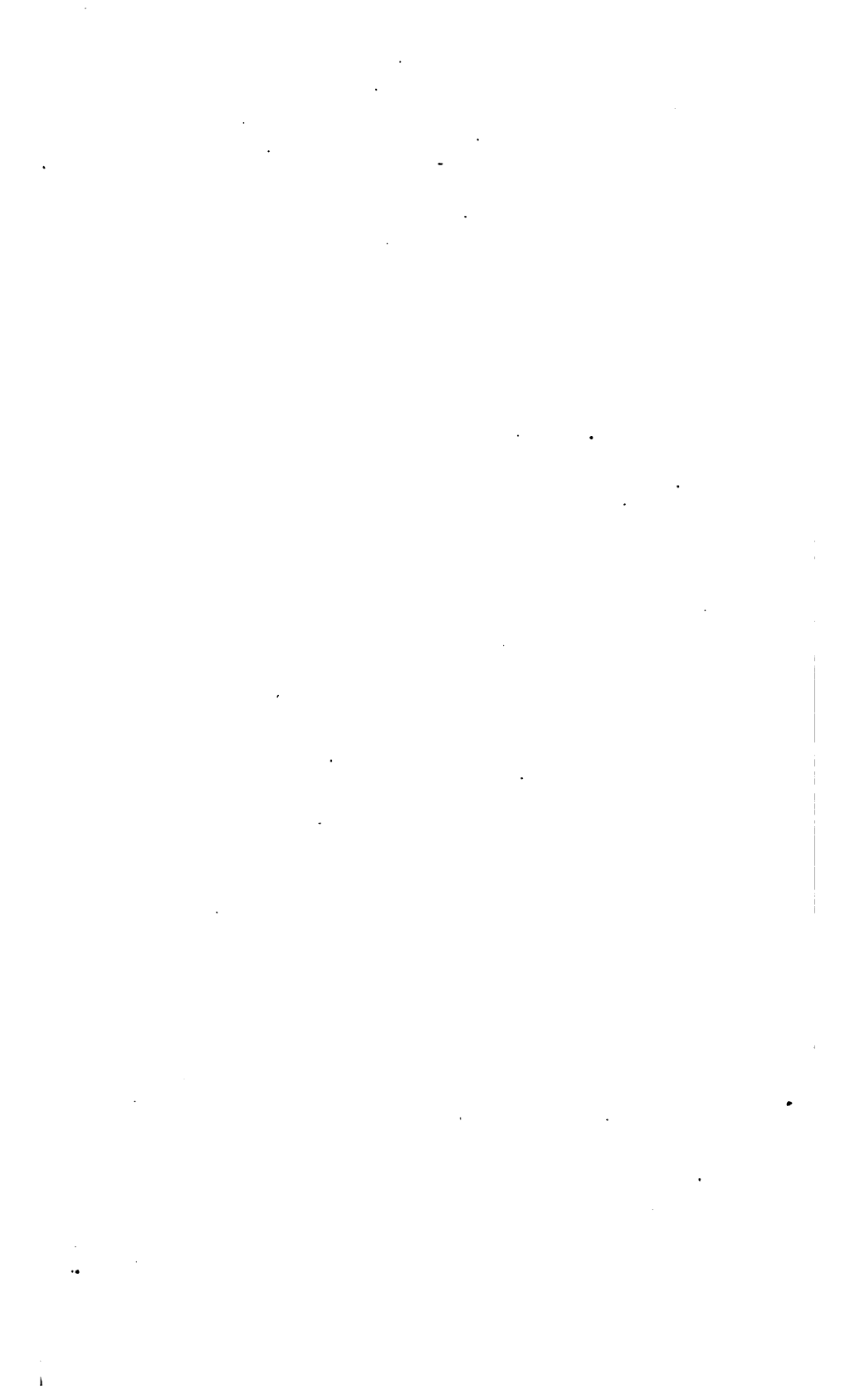
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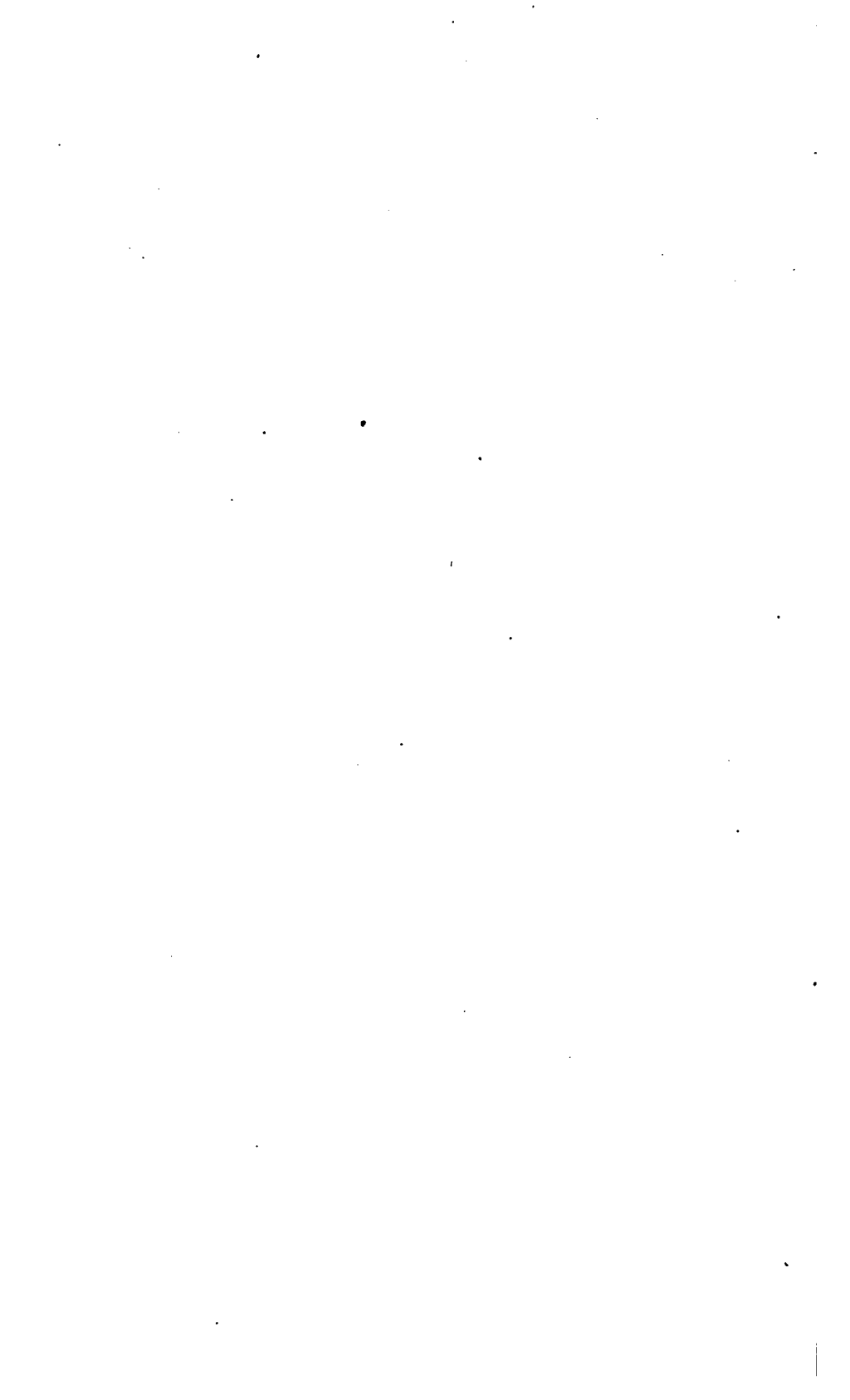
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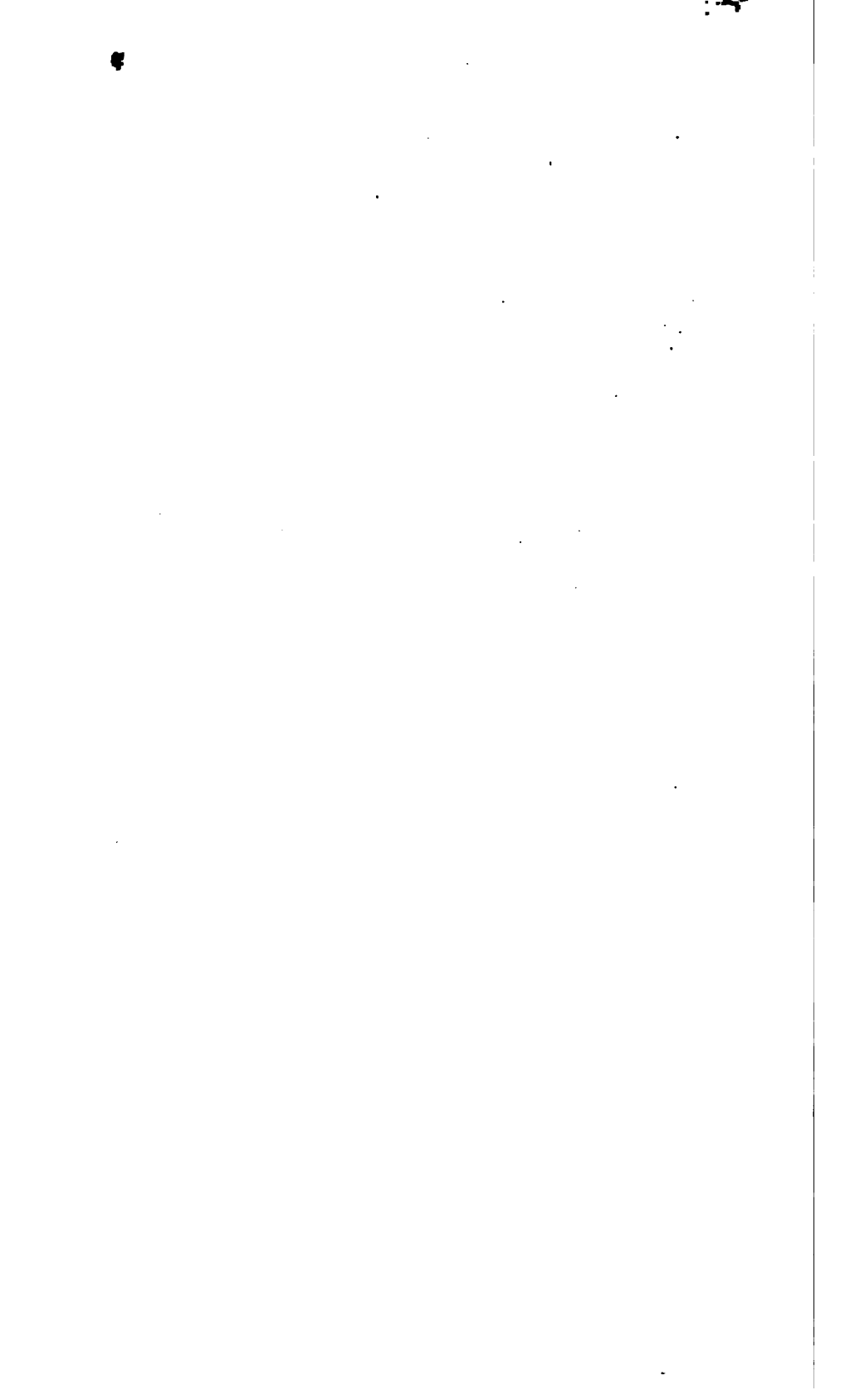
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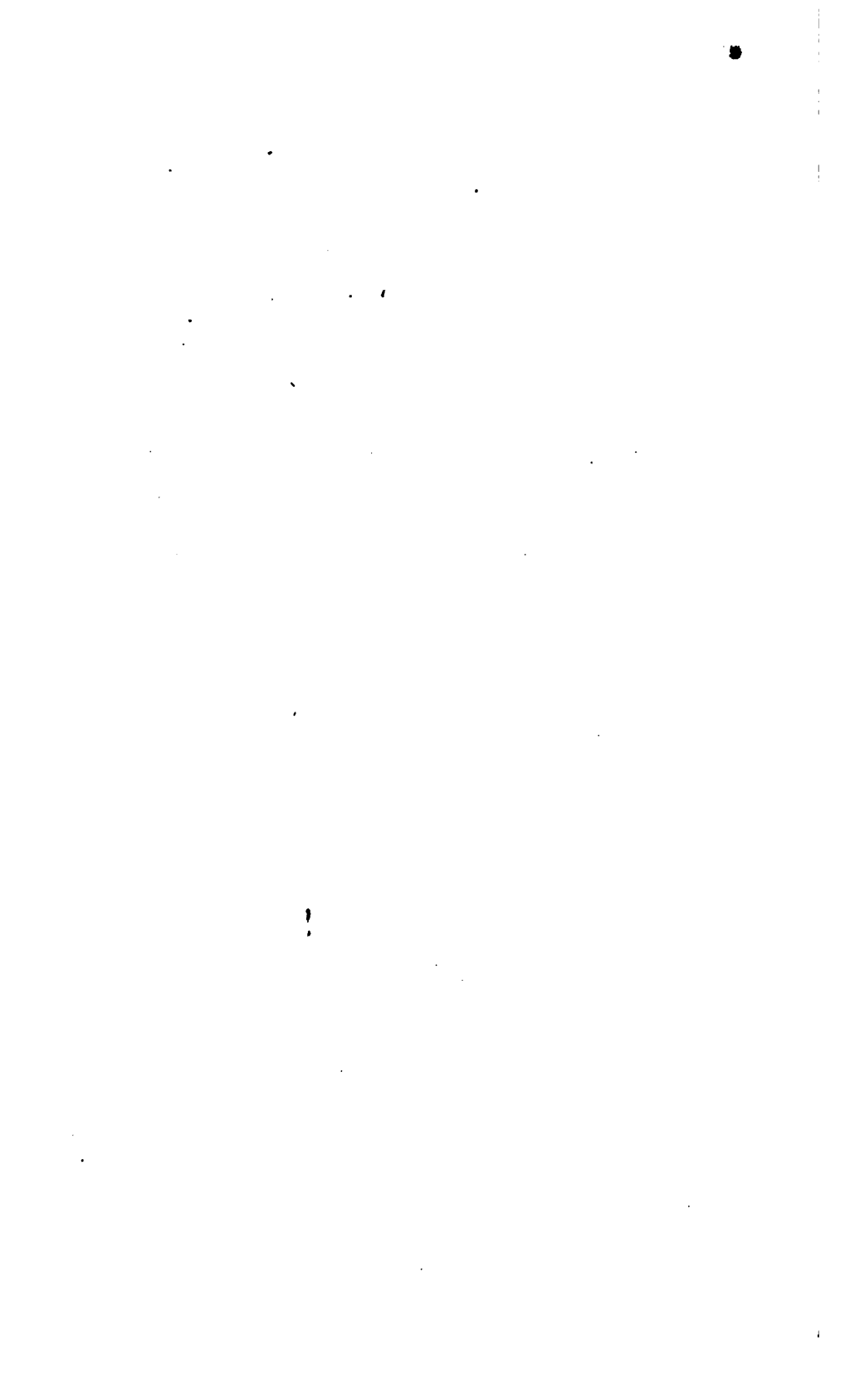
As framed by the Judges, in pursuance of the statute 1 & 2 Vict. c. 110, 330















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